

On August 23, 2002, Harold Green and 122 others (hereinafter sometimes called "Mr. Green") filed a suit in Chancery Court of Rankin County against the District. *Green v. Cleary Water, Sewer & Fire District*, 910 So. 2d 1022, 1025 (Miss. 2005). The complaint sought declaratory action to rule that the Ordinance was unconstitutional, was pre-empted by other state police power, was outside the ambit powers of the district, and was an unconstitutional taking of property without just compensation. *Id.* In addition, the complaint sought injunctive relief to prevent the District from coercion by threatening to cut off water service to individuals who refused to comply with the ordinance. *Id.*

On September 3, 2002, the City of Richland, Mississippi, filed a Motion to Intervene, arguing that the District had no authority to regulate individual on-site wastewater systems. *Id.* On September 3, 2002, the Chancery Court of Rankin County, Mississippi entered an order granting Mr. Green's motion for preliminary injunction and granting the City of Richland's Motion to Intervene. *Id.*

On January 26, 2003, the District filed a Motion to Dismiss or in the Alternative for Summary Judgment and Other Relief. *Id.* at 1026. On February 10, 2003, Harold Green and 125 others filed a Response to the District's Motion to Dismiss and filed its own Motion for Summary Judgment. *Id.* On April 17, 2003, the Chancery Court entered an Order Granting the District's Motion for Summary Judgment and Denying Harold Green's Motion for Summary Judgment without opinion. *Id.* The trial Court's Judgment failed to address the issue of whether the Ordinance constituted an unconstitutional taking in violation of U.S. Const. Amend. V and Miss. Const. Art. 3

§ 17. Harold Green, *et al.*, and the City of Richland filed a Notice of Appeal on May 16, 2003. *Id.* at 1025.

On appeal the Mississippi Court of Appeals, issued an opinion on August 3, 2004, affirming the judgment of the Chancery Court and holding that the District's adoption of the ordinance was a valid exercise of its police power pursuant to Miss. Code Ann. § 19-5-173. *Green v. Cleary*, 910 So. 2d 1, 6 (Miss. App. 2004). The Mississippi Court of Appeals also held that while sewer districts are not one of the entities which the legislature expressly gave the power to adopt ordinances regulating on-site water disposal systems, the District's actions were appropriate where the legislature did not expressly prevent such regulation. *Id.* The issue of whether the actions of the District constituted an unconstitutional taking in violation of the U.S. Const. Amend. V and Miss. Const. Art. 3 § 17 was reasserted on appeal. *Green*, 910 So. 2d at 1031. The Court of Appeals *failed* to address the issue of whether the Ordinance constituted an unconstitutional taking in violation of U.S. Const. Amend. V and Miss. Const. Art. 3 § 17. *Id.*

The dissenting opinion of Justice Griffis, held in pertinent part as follows:

In *Lepre v. D'Iberville Water and Sewer Dist.*, 376 So. 2d 191, 194 (Miss. 1979), the Mississippi Supreme Court held that a water/sewer district may only exercise such powers as are expressly delegated to it by the legislature.

The appellants argue that the District's authority is derived from Mississippi Code Annotated §§ 19-5-151-257 (Rev. 2003) and is limited by the following statement of the District's general powers:

Districts . . . shall have the powers enumerated in the resolution of the board of supervisors creating such districts but shall be limited to the conducting and operating of a water supply system, a sewer system, . . . or a combined water and sewer system, . . . and to carry out such purpose or purposes, such districts shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain, and operate such system or systems. . . .

Miss. Code Ann. § 19-5-175 (Rev. 2003) (emphasis added). The District argues that its authority is much broader and that its authority to enact the ordinance comes from Mississippi Code Annotated § 19-5-173 (Rev. 2003), which provides: The board of commissioners shall have the power to make regulations to secure the general health of those residing in the district; to prevent, remove and abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools, and to regulate or suppress those already constructed; and to compel and regulate the connection of all property with sewers.

Mississippi Code Annotated Section 19-5-175 (Rev. 2003) expressly limits the District's authority to "sewer systems." Mississippi Code Annotated Section 49-17-5(c) (Rev. 2003) sets forth a definition of a "sewerage system" to mean "pipelines or conduits, pumping stations, and force mains, and other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal." I can find no definition, either statutory or otherwise, that would suggest

that a sewer system includes individual on-site wastewater disposal systems or septic tanks.

Clearly, the legislature recognized a difference between sewer systems and septic tanks by enacting the Mississippi Individual On-Site Wastewater Disposal System Law. Miss. Code Ann. §§ 41-67-1 *et seq.* (Rev. 2001). The Mississippi Individual On-Site Wastewater Disposal System Law provides for a comprehensive statutory scheme for regulating septic tanks. Miss. Code Ann. § 41-67-3(1) (Rev. 2001). The legislature specifically granted the power to promulgate rules and regulations regarding septic tanks to the Mississippi State Board of Health. Miss. Code Ann. §§ 41-67-3(1)(b) and 41-67-3(4) (Rev. 2001).

The majority rejects the statutory limitations on the District's powers, as established in Mississippi Code Annotated Section 19-5-175 (Rev. 2003), and bases its decision on the general police powers of Mississippi Code Annotated Section 19-5-173 (Rev. 2003). Section 19-5-173 grants regulatory power to the District to: (1) make regulations to secure the general health of residents in a district; (2) prevent, remove and abate nuisances; (3) regulate or prohibit construction of privy-vaults and cesspools; (4) regulate or suppress privy-vaults or cesspools already constructed; and (5) compel and regulate the connection of all property with sewers. The District's ordinance does not relate to any type of nuisance and it does not attempt to connect all property with sewers. Privy-vaults and cesspools refer to out-houses and other structures that retain sewage but provide little or no treatment before releasing the sewage to the surrounding area. Thus, the majority determines that the ordinance was enacted to secure the general health of residents.

The Mississippi Individual On-Site Wastewater Disposal System Law ensures that individual on-site wastewater disposal systems (septic tanks) are properly designed, constructed, operated and maintained. Miss. Code Ann. § 41-67-3(1)(a) (Rev. 2003). The legislature granted the State Board of Health with primary responsibility over septic tanks and specifically authorized the Mississippi Department of Environmental Quality to assist in the administration of the State Board of Health's responsibilities and clearly defined each department's role and responsibilities in overseeing the use of septic tanks. *Id.* Thus, by statutory enactment, the State Board of Health and the Mississippi Department of Environmental Quality have the responsibility to ensure that septic tanks do not adversely affect the general health of residents. *Id.*

In Mississippi Code Annotated Section 41-67-15 (Rev. 2003), the legislature determined that "nothing in this chapter [the Mississippi Individual On-Site Wastewater Disposal System Law] shall limit the authority of a municipality or board of supervisors to adopt similar ordinances which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern." The District is neither a municipality nor a board of supervisors. Accordingly, the Mississippi Individual On-Site Wastewater Disposal System Law preempts the regulation of individual on-site wastewater disposal systems, or septic tanks, by the District.

As such, the District had no authority to promulgate rules and regulations regarding septic tanks.

In conclusion, the individual appellants are not served by the District's centralized sewer system. As a result, they are required to install an individual septic tank pursuant to the rules and regulations of the State Board of Health. If the District were to install a centralized sewer system to everyone within its boundaries, then the District would have the statutory authority to require that every resident be connected to the District's system. Through the enactment of this ordinance, I find that the District has acted beyond its jurisdictional bounds and has no authority to regulate individual on-site wastewater disposal systems, and the chancellor erred as a matter of law in granting the summary judgment in favor of the District.

Green, 910 So. 2d at 7-8.

The judgment of the Mississippi Court of Appeals, was appealed to the Mississippi Supreme Court on grant of writ of certiorari. *Green v. Cleary*, 892 So. 2d 824 (Miss. 2005) and *Green v. Cleary*, 910 So. 2d 1022 (Miss. 2005). The Mississippi Supreme Court held that the District had the authority to enact the ordinance under its general police power as long as the District's regulation does not conflict with the regulations enacted by the Mississippi State Department of Health. *Green*, 910 So. 2d at 1029. The Supreme Court further held that the trial court erred in entering summary judgment as there remained a genuine issue as to whether the District's regulation conflicted with those of the Mississippi State Department of Health. *Id.* at 1030. The issue of whether the actions of the District constituted an unconstitutional taking in violation of the U.S. Const. Amend. V and Miss. Const. Art. 3 § 17 was reasserted before the Mississippi Supreme

Court. *Green*, 910 So. 2d 1030. The Mississippi Supreme Court held that there existed genuine issues of material facts in regard to the issue of whether the Ordinance constituted an unconstitutional taking in violation of US Const. Amend. V. and Miss. Const. Art. 3 § 17, such that summary judgment was inappropriate. *Green*, 910 So. 2d at 1030.

Motion for Rehearing was filed urging the Court to reconsider its ruling and urging the Court to adopt the dissenting Mississippi Court of Appeals opinion issued by Justice Griffis. The Mississippi Supreme Court denied the Motion for Rehearing on September 15, 2005.

ARGUMENT

WHETHER THE MISSISSIPPI STATE COURTS ERRED IN FAILING TO RULE THAT THE ORDINANCE AS ENACTED CONSTITUTES A TAKING OF PRIVATE PROPERTY WITHOUT DUE COMPENSA- TION AS PROTECTED BY THE CONSTI- TUTION OF THE UNITED STATES OF AMERICA AND THE CONSTITUTION OF MISSISSIPPI

The Ordinance in question is a taking of Mr. Green's and others' private property by a government entity without just compensation, thereby violating the Mississippi Constitution and the United States Constitution. The Ordinance first requires that before a landowner can build a residence on his own personal property, the landowner must grant the District an easement to the District for the installation and repair of system. *See* Article IV Section 7 of the Ordinance.

Not only does the District require that the individual system be deeded over to the District, but also that the District is granted easement to the "repair area" which is defined as "an area, either in its natural state or which is capable of being modified consistent with these ordinances, which is reserved for the installation of additional disposal fields and is not covered with structures or impervious materials." See Article II, Section 19 of the Ordinance. Therefore, the District would acquire a property right to the majority of the open space of a typical residential lot located within the district. Once the District has obtained the property right to the individual system, the District will then charge the landowner a fee for using a system paid for by the landowner, installed by the landowner and maintained by the landowner. See Ordinance Article XIII, USER CHARGES.

Finally, the District has granted itself the power to fine persons found in violation of the Ordinance in an amount not to exceed \$1,000.00 for each violation. As a result, the District is "taking" private property without due compensation, and in fact is charging a fee for the use of one's own private property in clear violation of the Constitution of the State of Mississippi and the Constitution of the United States of America.

Article 3, Section 17 of the Constitution of the State of Mississippi provides that, "[p]rivate property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law." Section 17 is applicable where private property is taken for public use by public authorities. See also *Burkett v. Ross*, 86 So. 2d 33 (Miss. 1956).

Here the District, acting as a public authority is taking the private property of Mr. Green. The District requires that Mr. Green deed to the District a property right in Mr. Green's individual on-site wastewater disposal system, a system which Mr. Green paid to install and pays to maintain and is required by Mississippi Law to have and maintain on his property. *See City of Greenwood v. Gwin*, 121 So. 160 (Miss. 1929) (holding even if City had public interest to provide water and sewer, easement on private property constituted taking without compensation). The District purports to take Mr. Green's property without just compensation. The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. *See Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court addressed the issue of whether a government entity can require a property owner to grant a property right, as a condition for a building permit. *Dolan*, 512 U.S. at 383-84. In *Dolan*, the owner of the business wanted to expand the size of the building. *Id.* at 382. As part of the permit approval process, the City of Tigard required the property owner to dedicate a portion of the property to a public walkway and bicycle path. *Id.* The property owner argued that the city had forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easement. *Id.* at 386. The Supreme Court held that the city may not require a person to "give up a constitutional

right in exchange for discretionary benefit conferred by the government." *Id.* at 385; *see also Perry v. Sindermann*, 408 U.S. 593 (1972). Therefore, the Court ruled that the city's actions constituted a taking of private property without compensation.

In the present case, the District is attempting to take private property without due compensation. In fact, not only is the District taking the property, the District is then charging a fee to the landowner to use a system, which the landowner had already paid for in the first place. In Mississippi and in the United States of America, private use of land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Therefore, if this Court determines that the District has the jurisdiction to regulate the use of on-site wastewater systems, the Ordinance in question still violates Mr. Green's and 125 others' constitutional rights to not have private property taken without due compensation.

The effect of this decision on those households in, not only Mississippi, but in the entirety of the United States may be far reaching. Attached hereto and hereby, herein incorporated by reference, is a table depicting the number of households in the United States which utilize on-site wastewater systems. (See Appendix "G"). Twenty-five percent of the households in the United States utilize on-site wastewater systems. (See Appendix "G"). The majority of these on-site wastewater systems are regulated by State Health Departments. This is just the regulatory scheme enacted by the Mississippi Legislature.

The Mississippi Legislature has clearly provided a comprehensive statutory scheme for regulating on-site wastewater systems. *See* Miss Code Ann. § 41-67-1 *et seq.*, (hereinafter the "Mississippi Individual On-Site Wastewater Disposal System Law"). The Mississippi Individual On-Site Wastewater Disposal System Law provides that, in the interest of the health and safety of the citizens of Mississippi, the Mississippi Board of Health shall have the power to promulgate rules and regulations regarding individual systems and their performance standards. Miss. Code Ann. §§ 41-67-3(1), (2)(b) & (4). Most importantly, it provides that all rules and regulations of the Board of Health with regard to individual systems shall be applied uniformly in all areas of the state. Miss. Code Ann. § 41-67-3(6). Consequently, the Legislature, by enacting the Individual On-Site Wastewater Disposal System Law, recognized the need for a statewide uniform law governing on-site wastewater systems.

However, the Legislature did not stop at simply delegating its authority to the Board of Health. The Legislature went further by expressly providing the requirements for on-site wastewater systems, the standard for existing systems, the repair and maintenance requirements for individual systems and also providing civil and criminal penalties for violating any statutory provision. *See* Miss. Code Ann. § 41-67-7 (establishing requirements); § 41-67-9 (establishing standard for existing systems); § 41-67-21 (providing for repair of system and penalties for failure to repair); § 41-67-28 (establishing civil and criminal violations).

The Mississippi Individual On-Site Wastewater Disposal Law provides that nothing in the chapter shall limit the authority of a municipality or board of supervisors to

adopt similar ordinances, which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern. Miss. Code Ann. § 41-67-15. However, the law does not grant similar authority to a Water, Sewer and Fire District. *See generally*, Miss. Code Ann. § 41-67-3. Logically, the expression by the Mississippi Legislature that only municipalities and boards of supervisors may adopt similar ordinances clearly excludes sewer districts like Cleary from enacting similar ordinances. *See Mississippi Milk Commission v. Winn-Dixie Louisiana, Inc.*, 235 So. 2d 684 (Miss. 1970) (stating expression of one thing is the exclusion of another).

The Mississippi Legislature, by enacting the "Mississippi Individual On-Site Wastewater Disposal Law" (Miss. Code Ann. § 41-67-1, *et seq.*), preempted the field as it relates to the regulation and governing of on-site wastewater systems. Under Mississippi Law, a political subdivision may not pass an ordinance upon a subject for which the state has preempted, either by express language or through regulation of a particular matter. *See Watkins v. Navarette*, 227 So. 2d 853 (Miss. 1969).

In three opinions, the Mississippi Attorney General has concluded that the Legislature has implemented a particular statutory scheme to regulate individual systems in Section 41-67-1, *et seq.*, and has effectively preempted the field. *See* 2001 WL 169636 (Miss. A.G.); 2001 WL 1513788 (Miss. A.G.); and 1997 WL 370265 (Miss. A.G.). *See also* MS AG Op., Ross (August 12, 1999) (noting that only counties and municipalities can enact ordinances similar to or more restrictive than the provisions of the Disposal Law).

Pursuant to Miss. Code Ann. § 41-67-11 of the Disposal Law, read in conjunction with Miss. Code Ann. § 19-5-207 a sewer district can install and maintain sewage holding tanks on residential property, *but only if funding for a municipal or community sewer has been awarded to the district*, and only as a temporary measure until the "sewer system" can be constructed. It is important to note that sewer districts cannot, on their authority, install or regulate sewage holding tanks. The sewer district must first get the approval of the Department of Health before installation can begin. *Id.* As a result, it is clear that the Mississippi Legislature granted the Board of Health authority, which preempts the authority of a sewer district with regard to regulating on-site wastewater systems.

The State Board of Health, having been legislatively granted the exclusive authority to regulated on-site wastewater systems, adopted an extensive set of rules and regulations governing individual systems. Mississippi Board of Health Regulation 2.0 Individual On-site Waste Disposal, http://www.msdh.state.ms.us/msdhsite/_static/resources/52.pdf. This further supports the assertion that the Legislature intended, by enacting the Mississippi Individual On-Site Wastewater Disposal Law, to preempt the field in regard to individual disposal systems. As a result, the District is prohibited from passing any ordinance regarding the use, design, construction, operation and repair of on-site wastewater systems.

As a final point, if the District is so concerned with the public's health and safety and the impact of individual systems, the District has the authority and power to construct a sewer system to service every home within the District. Instead, the District attempts to usurp the power

and jurisdiction of the Department of Health by enacting an Ordinance governing on-site wastewater systems.

Before a governing body can regulate a particular subject matter the governing body must first have the authority or jurisdiction to regulate the subject matter. *Lepre v. D'Iberville Water and Sewer Dist.*, 376 So. 2d 191, 194 (Miss. 1979); *Watkins v. Navarrette*, 227 So. 2d 853 (Miss. 1969). In *Lepre*, the Mississippi Supreme Court stated that, a water/sewer district "may exercise only such powers as are expressly delegated to it by the Legislature." *Lepre*, 376 So. 2d at 194. It is undisputed that the District's sole authority and jurisdiction is derived from Mississippi Code Annotated, §§ 19-5-151 through 19-5-257, *Mississippi Code of 1972*, as amended. The authority to regulate must be found within the four corners of these statutory provisions. A careful review of § 19-5-151 through § 19-5-257, reveals that there is no legislative authority expressly granted to the District to regulate on-site wastewater systems.

The entire reason sewer districts were originally created, was to construct "centralized sewer systems" so that individual systems would not be required. If a District is allowed to regulate individual systems in the manner in which it seeks with this Ordinance, so as to simply allow sewer districts statewide to forgo the sole reason they were created – construction and operation of centralized sewer systems.

Miss. Code Ann. § 19-5-175 sets forth the District's general powers, as follows:

Districts created under the provision of Section 19-5-151 through 19-5-207 shall have the powers

enumerated in the resolution of the board of supervisors creating such districts but shall be limited to the conducting and operating of a water supply system, a sewer system, . . . or a combined water and sewer system, . . . such districts shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems . . .

Id. As a result, the Legislature has expressly limited the powers of a "sewer district" to the business of operating a "sewer system".

Nowhere within the remaining provisions of §§ 19-5-151 through 19-5-257, does it expressly provide a "sewer district" with the authority to regulate on-site wastewater systems. Since the statute is clear and unambiguous, there is no room for judicial construction. The court is obligated to apply the clear meaning of the statute and find that the District is attempting to exercise power that is not expressly granted. Therefore, the Ordinance is void.

Since there is no expressed statutory authority provided to the District to regulate on-site wastewater systems, the focus shifts to whether the term "sewer system" as provided in § 19-5-151, *et seq.*, encompasses the term "individual on-site wastewater disposal system." Although not defined in § 19-5-151, *et seq.*, it is clear from common sense and other Legislative actions that on-site wastewater systems are not included within the definition of "sewer system".

The Legislature irrefutably recognized the difference between a "sewer system" and "individual on-site wastewater disposal system" by the enactment of the "Mississippi Individual On-Site Wastewater Disposal System

Law". See Miss. Code Ann. § 41-67-1, *et seq.* The Legislature defines a "sewer system" "pipelines or conduits, pumping stations, and force mains, and other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal." See Miss. Code Ann. § 49-17-5(1)(c). The Individual On-Site Wastewater Disposal System Law, on the other hand, is a comprehensive statutory scheme for the design, construction, use and maintenance of on-site wastewater systems. The Mississippi Individual On-Site Wastewater Disposal Law clearly forms a distinction between a "sewer system" and an "individual on-site wastewater disposal system" by providing that on-site wastewater systems "shall be considered acceptable" in areas where "sewers are not available or feasible". Miss. Code Ann. §§ 41-67-7(1)(a) and 41-67-7(2)(a).

Finally, the Mississippi Legislature addressed the issue once more, by providing when the Board of Health may approve the use of "sewage holding tanks." Miss. Code Ann. § 41-67-11(2). It is clear that the Legislature realized that sewer districts have no jurisdiction over on-site wastewater systems when it provided that a sewer district could install temporary holding tanks only until such time as a "sewage system" could be constructed, at which time, the sewer district shall connect the resident to the "sewage system." In other words, a district such as the Cleary Sewer District may install holding tanks only as a temporary solution for the disposal of sewage until such time as the "sewer system" for which the district was created to construct and operate is built and operating.

Third, the State Board of Health has acknowledged the difference between "sewer system" and "individual on-site wastewater disposal system". The Board of Health has

promulgated rules and regulations governing the disposal of all sewage in Mississippi. The Board of Health's rules and regulations provide that each home shall be connected to a system of sewers where available. If a system of sewers is not available the home shall utilize a wastewater disposal system. See Mississippi Board of Health Regulation 2.0 Individual On-Site Wastewater Disposal, http://www.msdh.state.ms.us/msdhsite/_static/resources/52.pdf. Accordingly, each home in Mississippi must be either connected to a sewer system or to an individual on-site wastewater disposal system. In so doing, the Board of Health recognizes that the term "sewer system" does not encompass the term "individual on-site wastewater disposal system."

Fourth, the United States Environmental Protection Agency has addressed the issue by defining the two terms as follows:

Individual systems. Privately owned alternative wastewater treatment works serving one or more principal residences or small commercial establishments which are neither connected into nor a part of any conventional treatment works. Normally, these are on-site systems with localized treatment and disposal of wastewater with minimal or no conveyance of untreated waste water.

Conventional system. A collection and treatment system consisting of minimum size (6 or 8 inch) gravity collector sewers normally with manholes, force mains, pumping and lift stations, and interceptors leading to a central treatment plant.

Finally, the Mississippi Supreme Court acknowledged the distinction between sewer system and individual disposal system in the case of *Lepre v. D'Iberville Water and Sewer District*, 376 So. 2d 191 (Miss. 1979). In *Lepre*, the Mississippi Supreme Court addressed the issue of whether a Sewer District had the authority to require that all households within the district connect to the public water and sewer system. *Id.* at 194. The Court found that the District was expressly granted the authority to "require mandatory connection of all residences and businesses" to the public system. *Id.* The distinction between *Lepre* and this case is clear. In *Lepre*, the D'Iberville Water and Sewer District provided a public or centralized system. In the instant case, although the District has a centralized sewer system, it does not provide a "sewer system" to Mr. Green. Thus, under Mississippi law, Mr. Green and the other residents of the District who are not served by the District's centralized sewer system are required under the Mississippi Individual On-Site Wastewater Disposal System Law to install an individual system pursuant to the rules and regulations of the Board of Health.

The Supreme Court has consistently held that administrative bodies have only such powers as are expressly granted them within the "four corners" of the statute under which the political body operates. *Strong v. Bostick*, 420 So. 2d 1356, 1361 (Miss. 1982). It is likewise well settled that an administrative body, such as the District, "has no inherent powers." Moreover, the political body may not make and adopt rules "under the guise of 'implied power' which exceed or conflict with the authority granted it by statute." *Mississippi Public Service Comm. v. Mississippi Power & Light Co.*, 593 So. 2d 997, 1000 (Miss. 1991).

The Commission attempts to use its general police powers as provided in Miss. Code Ann. § 15-5-173 as the authority to regulate on-site wastewater systems. However, the subject matter of the Ordinance falls short of the expressed regulatory powers of the Commission. Section 19-5-173 provides three areas in which the Commission may pass regulations: (1) to prevent, remove and abate nuisances; (2) to regulate or prohibit construction of privy-vaults and cesspools; and (3) to compel and regulate the connection of all property with sewers. Miss. Code Ann. § 19-5-173.

In this case, the Ordinance does not pertain to any of the above requirements. First, the use of on-site wastewater systems does not constitute a nuisance. In fact, the Mississippi Legislature has declared that on-site wastewater systems "shall be acceptable" in areas where no centralized sewer system is available. Miss. Code Ann. §§ 41-67-7(1)(a) and 41-67-7(2)(a).

Second, the on-site wastewater systems are neither privy-vaults or cesspools. The Environmental Protection Agency defines a cesspool as "a 'drywell' which sometimes has an open bottom and/or perforated sides, and receives untreated sanitary waste." <http://www.epa.gov/safewater/uic/c15oper/cesspools.html>. Privy-vaults are commonly referred to as "outhouses". See Mississippi State Department of Health Regulation 2.0 Individual On-site Wastewater Disposal Design Standard XII http://www.msdh.state.ms.us/msdhsite/_static/resources/65.pdf. On-site wastewater systems as provided in the Ordinance are neither privy-vaults nor cesspools, and thus, do not fall within the expressed authority of the Commission to regulate.

Finally, the Ordinance does not pertain to the connection with sewers. The District does not provide a sewer system to Mr. Green and others. Since the District does not have a centralized sewer system available to Mr. Green and the others, it is difficult to require them to connect to a system that is not available to them. In fact, this whole question of regulating on-site wastewater systems would be moot if the District installed a sewer system throughout the entire district.

As a result, the Commission has no expressed or implied authority to regulate on-site wastewater systems found within the four corners of the District's regulatory powers. Therefore, the Ordinance is unconstitutional and void.

CONCLUSION

The Ordinance enacted by the District requires those who utilize individual on-site wastewater disposal systems to deed over a portion of their property to the District. The District will then charge the landowner a fee for using a system paid for by the landowner, installed by the landowner and maintained by the landowner. The District's attempts to regulate Individual On-Site Wastewater Disposal Systems, same being an unconstitutional taking of property without just compensation in violation of the

Fifth Amendment of the United States Constitution and
Miss. Const. Art. 3 § 17 (1890).

Respectfully submitted,

Harold Green, and 125 Others

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No. _____

In The
Supreme Court of the United States

HAROLD GREEN, ET AL.,

Petitioners,

v.

CLEARY WATER, SEWER & FIRE DISTRICT,

Respondent.

**On Petition For Writ Of Certiorari
To The Mississippi Supreme Court**

APPENDIX

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910 So.2d 1022

Supreme Court of Mississippi.

Harold GREEN, et al., and City of Richland, Mississippi

v.

CLEARY WATER, SEWER & FIRE DISTRICT.

No. 2003-CT-01062-SCT.

June 23, 2005.

Rehearing Denied Sept. 15, 2005.

David Ringer, Paul B. Henderson, Jay Max Kilpatrick,
Jackson, attorneys for appellants.

James A. Bobo, Brandon, attorney for appellee.

EN BANC.

GRAVES, Justice, for the Court.

¶ 1. This case concerns actions taken by the Cleary Water, Sewer & Fire District ("Cleary" or "Cleary District") in adopting and implementing its "Decentralized Wastewater Use Ordinance" ("Ordinance") which regulates the disposal of wastewater by residents who are not connected to Cleary's sewer system. Numerous residents of the Cleary District brought suit seeking a declaration that the ordinance was invalid and an injunction prohibiting enforcement of that ordinance. The City of Richland intervened as a party plaintiff in this matter. The special chancellor appointed to hear this matter granted Cleary summary judgment. Plaintiffs appealed and charged that the trial court erred on five grounds: (1) that Cleary had no statutory authority or jurisdiction to enact the challenged ordinance; (2) that the ordinance enacted by Cleary was preempted by Mississippi Individual On-Site Wastewater Disposal System law, Miss.Code Ann.

§§ 41-67-1 et seq.; (3) that the ordinance unconstitutionally takes property without compensation under both the United States Constitution and Mississippi Constitution; (4) that the chancellor erred in considering affidavits not received by counsel opposite until minutes prior to the hearing in which they were introduced; and (5) that the chancellor erred in relying on affidavits of employees of state agencies, who purported to speak on behalf of the State, as being conclusive of the fact that the ordinance did not conflict with Health Department regulations.¹ A divided Court of Appeals affirmed the chancellor's decision. *Green v. Cleary Water, Sewer & Fire Dist.*, 910 So.2d 1 (Miss.Ct.App.2004). We granted certiorari.

FACTS AND PROCEDURAL HISTORY

¶ 2. The Cleary Water, Sewer and Fire District was created under the authority of Miss.Code Ann. §§ 19-5-151 through -207, which governs water, sewer, garbage disposal, and fire protection districts. Cleary obtained a certificate of convenience and necessity from the Public Service Commission authorizing it to construct, operate, and maintain a sewer system in a specified area within Rankin County. In 2000, Cleary obtained a supplemental certificate from the Public Service Commission which enlarged the area in which it was authorized to provide its services. Cleary sought to address a perceived problem of untreated or undertreated sewage being discharged onto the ground within the Cleary District by adopting the "Decentralized Wastewater Use Ordinance" which plaintiffs

¹ Richland only raises the first two issues stated above as assignments of error.

Harold Green, et al. and the City of Richland challenge here. Cleary maintains that it adopted the ordinance only after submitting it to the Mississippi State Department of Health (MDH) and the Mississippi Department of Environmental Quality (MDEQ) for comment and review.

¶ 3. Cleary published a Notice of Public Hearing concerning the possible adoption of the ordinance and then held a public hearing; no one at the hearing expressed opposition to the ordinance's adoption and Cleary adopted the ordinance at its June 14, 2001, meeting. Cleary sent a notice dated September 14, 2001, to all customers who received their supply of potable water from the Cleary District, informing them of the newly adopted ordinance and the steps that must be taken to comply with the ordinance.

¶ 4. The letter specifically informed water customers of the following: (1) Property owners with a properly working septic system would not be required to install a new system; (2) Each property owner must have his/her system inspected within one year of June 21, 2001, the date the letter was sent out, and have the results sent to Cleary's office; (3) Each year following the ordinance's institution, each property owner would be required to present proof that his/her system was working properly; (4) Property owners who could not show that their systems complied with the ordinance would be required to install an approved system and then become a sewer customer; (5) Cleary would accept ownership of the new disposal system and, in exchange, would maintain the unit for its usable life, bearing all routine maintenance costs; (6) Once becoming a sewer customer, property owners would be assessed a monthly service charge that would be added to their water bill; and (7) Present water customers were

given the option of transferring ownership of their existing systems to Cleary, subject to certain qualifications.

¶ 5. Harold Green and 122 other residents of Rankin County filed suit against Cleary in Rankin County Chancery Court on August 23, 2002, seeking both declaratory and injunctive relief. They charged that Cleary was without authority to enact the subject ordinance and wanted a declaration that the ordinance was void. They also sought to enjoin Cleary from enforcing the ordinance against plaintiffs who refused to comply with its terms. The City of Richland sought to intervene and its motion was granted on September 3, 2002.² Chancellors John S. Grant, III and Thomas L. Zebert issued an order of recusal, and this Court appointed Jason H. Floyd, Jr. as a special chancellor for this case on August 27, 2002. Cleary removed to federal court, invoking the court's federal question jurisdiction, but the federal court remanded the case to chancery court on January 13, 2003.

¶ 6. Cleary filed a motion to dismiss/motion for summary judgment on January 27, 2003. Plaintiffs filed their response and own motion for summary judgment on February 11, 2003. The chancellor held a hearing on the parties' various motions and granted Cleary's motion for summary judgment without a written opinion on April 17, 2003. Plaintiffs timely appealed the chancellor's decision. The Mississippi Court of Appeals found that Cleary had statutory authority to enact the challenged ordinance and affirmed the chancellor's ruling in an opinion dated August

² In the order granting Richland's motion to intervene, the chancellor also issued a preliminary injunction against Cleary's enforcement of the challenged ordinance.

3, 2004. This Court granted plaintiffs' petition for certiorari on January 27, 2005.³

DISCUSSION

¶ 7. This Court reviews a trial court's grant of summary judgment de novo, viewing the evidence in a light most favorable to the non-moving party. *Gale v. Thomas*, 759 So.2d 1150, 1152 (Miss.1999). A grant of summary judgment will be reversed if any triable issues of fact exist. *Id.* at 1152.

¶ 8. The numerous issues raised by plaintiffs can be distilled down to two: (1) whether Cleary had the authority to enact its ordinance, and (2) whether summary judgment was properly granted.

I. Whether the Cleary District possessed the authority to enact its "Decentralized Wastewater Use Ordinance."

¶ 9. At the heart of this appeal is whether Cleary had the authority to enact the ordinance being challenged by plaintiffs. Cleary argues that it is granted such authority under Miss.Code Ann. § 19-5-173⁴ and § 19-5-175.⁵ Plaintiffs

³ 892 So.2d 824 (Miss.2005) (table).

⁴ Miss.Code Ann. § 19-5-173 (Rev.2003) states:

The board of commissioners shall have the power to make regulations to secure the general health of those residing in the district; to prevent, remove and abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools, and to regulate or suppress those already constructed; and to compel and regulate the connection of all property with sewers.

⁵ Miss.Code Ann. § 19-5-175 (Rev.2003) states general powers granted to water, sewer, garbage disposal and fire protection districts. It states in part:

recognize Cleary's authority to build, maintain, and regulate a "sewer system" within the Cleary District but argue that Cleary is without authority to enact its "Decentralized Wastewater Use Ordinance" because the Legislature granted the Mississippi State Board of Health sole authority to regulate septic tanks under the Mississippi Individual On-Site Wastewater Disposal System Law, Miss.Code Ann. §§ 41-67-1 et seq.

¶ 10. Plaintiffs argue that a water or sewer district, being a statutory creation, may only exercise those powers expressly granted or necessarily implied by the Legislature and that such powers "must be found within the four corners of the statute under which the agency operates." *Strong v. Bostick*, 420 So.2d 1356, 1361 (Miss.1982) (citing *Miss. Milk Comm'n v. Winn-Dixie La., Inc.*, 235 So.2d 684 (Miss.1970)). Because the statutes governing districts such as Cleary do not mention individual septic systems and the Legislature specifically granted the Department of Health authority to regulate individual on-site wastewater disposal systems (IOWDS) under Miss.Code Ann. §§ 41-67-1 et seq., plaintiffs allege that Cleary is without authority to regulate individual septic systems to control water quality within the district it governs.

[a]ny district created pursuant to the provision of Sections 19-5-151 through 19-5-207 shall be vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created. No enumeration of powers herein shall be construed to impair or limit any general grant of power herein contained nor to limit any such grant to a power or powers of the same class or classes as those enumerated. Such districts are empowered to do all acts necessary, proper or convenient in the exercise of the powers granted under such sections.

¶ 11. Whether Cleary had the authority to enact the subject ordinance is dependent on how this Court construes competing statutes. In affirming the trial court's grant of summary judgment, the Court of Appeals found that Cleary had the authority to enact its ordinance under "general police powers" granted to water and/or sewer districts in Miss.Code Ann. § 19-5-173 (Rev.2003). *Green*, 910 So.2d at 5-6. The Court of Appeals also found that the Mississippi On-Site Wastewater Disposal System Law did not "expressly prevent" Cleary from "regulating the use or maintenance of individual on-site wastewater disposal systems," despite the fact that sewer districts were not mentioned in this statutory scheme. *Green*, 910 So.2d at 6. The Court of Appeals further stated that enactment of Miss.Code Ann. §§ 41-67-1 et seq., did not operate to repeal Miss.Code Ann. § 19-5-173, which gave Cleary the authority to "protect the potable water that it supplies to its customers through regulations protecting the health of these customers." *Green*, 910 So.2d at 6.

¶ 12. Plaintiffs, however, point out that the State Board of Health is given authority "[t]o exercise general supervision over the design, construction, operation, and maintenance of individual on-site wastewater disposal systems . . . " and "[t]o adopt, modify, repeal and promulgate rules and regulations" regarding such systems under Miss.Code Ann. § 41-67-3(1). They argue that this grant to the Department of Health is exclusive and that the Legislature, in adopting the Mississippi Individual On-Site Wastewater Disposal System Law, preempted other agencies or political bodies from regulating these types of disposal systems. While this provision gives the Mississippi State Board of Health a general grant of power, this Court has not found any language giving the Board "exclusive"

authority in this area, as plaintiffs contend. In fact, § 41-67-3(1)(a) says that the State Department of Health and the Department of Environmental Quality "shall enter into a memorandum of understanding, which at a minimum shall clearly define the jurisdiction of each department with regard to wastewater disposal and procedures for interdepartmental interaction and cooperation." Moreover, § 41-67-3(2) allows professional engineers to provide "design, construction or installation" services for individual disposal systems and actually exempts such engineers from the certification requirements of § 41-67-3(1)(c). This language does not indicate the exclusive vesting of power in the Department of Health as plaintiffs allege.

¶ 13. Plaintiffs do recognize an exception to the health department's exclusive authority to regulate individual waste disposal systems in Miss.Code Ann. § 41-67-15, which states:

[n]othing in this chapter shall limit the authority of a municipality or board of supervisors to adopt similar ordinances which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern.

Since the Legislature did not include sewer districts within this provision, plaintiffs argue that those districts are without power to enact ordinances that concern individual septic systems. They claim that the language here is unambiguous, making statutory interpretation unnecessary and improper. See *Marx v. Broom*, 632 So.2d 1315, 1318 (Miss.1994) (stating that "courts cannot restrict or enlarge the meaning of an unambiguous statute"). Plaintiffs seek to bolster this position by noting that water

and/or sewer districts such as Cleary were specifically mentioned in another provision of the Mississippi Individual On-Site Wastewater Disposal System Law. This provision regarding temporary disposal systems states:

The board may approve the installation of sewage holding tanks in districts created under Sections 19-5-151 through 19-5-207 for the purpose of providing sewage services. The district shall be required to maintain or provide for the maintenance of those holding tanks. The board shall require that residences be connected to a municipal or community sewage system when that system is available and ready to use.

Miss.Code Ann. § 41-67-11(2).

¶ 14. Water and/or sewer districts were given the authority to maintain "sewage holding tanks" with the Board of Health's approval under § 41-67-11(2), yet omitted from § 41-67-15, which gave municipalities and boards of supervisors authority to enact ordinances that were more restrictive than those enacted by the Board of Health. Despite this omission, in the statutory scheme of Miss.Code Ann. §§ 41-67-1 et seq. does not prohibit water and/or sewer districts from regulating individual on-site wastewater systems. Though § 41-67-15 makes no mention of utility districts, it does not forbid Cleary from adopting the subject ordinance, which the Court of Appeals correctly noted.

¶ 15. In addition to the authority granted to water and/or sewer districts under § 19-5-173, Miss.Code Ann. § 19-5-175 grants Cleary "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created" and states that none of Cleary's

enumerated powers “shall be construed to impair or limit any general grant of power.” Districts such as Cleary are authorized “to do all acts necessary, proper or convenient” in exercising the powers granted to them. *Id.*

¶ 16. The Court of Appeals correctly held that Cleary has authority under its general police power to insure the purity of the water it supplies to its customers. However, that police power is not unlimited. The Board of Health is granted a general power to regulate individual wastewater disposal systems under the Mississippi Individual On-Site Wastewater Disposal System Law which is not expressly granted to districts such as Cleary. As such, any ordinance Cleary enacts, which attempts to regulate individual wastewater disposal systems, must comply with the rules and regulations adopted by the Board of Health. This principle is denoted in *City of Jackson v. Mississippi State Bldg. Comm’n*, 350 So.2d 63, 66 (Miss.1977), in which this Court stated that “express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith.”

¶ 17. The fact that the Board of Health has this general power does not necessarily mean that Cleary is without power to regulate in this area also. Both of the statutory schemes at issue here, Miss.Code Ann. §§ 19-5-151 et seq. and Miss.Code Ann. §§ 41-67-1 et seq., regulate health-related matters. As such, they can be considered in *pari materia*, and any ambiguities in one provision should be resolved “by applying the statute consistently with other statutes dealing with the same or similar subject matter.” *State ex rel. Hood v. Madison County*, 873 So.2d 85, 90 (Miss.2004). Stated similarly, “statutes on the same subject, although in apparent conflict, should, if possible, be construed in harmony with each other to give effect to

each." *Boyles v. Miss. State Oil & Gas Bd.*, 794 So.2d 149, 160 (Miss.2001). With this rule of construction in mind, we find that Cleary does have authority to adopt rules similar to those in its "Decentralized Wastewater Use Ordinance," but the rules and regulations adopted by the Department of Health must take precedence over any conflicting provisions in the Cleary Ordinance.

¶ 18. This Court finds that the Cleary District did have authority under Miss.Code Ann. §§ 19-5-173 & -175 to enact an ordinance which would protect its water supply and that such action was not preempted by the Mississippi Individual On-Site Wastewater Disposal System Law. However, any provision of such ordinance that conflicts with rules or regulations adopted by State Board of Health, pursuant to its powers under Miss.Code Ann. §§ 41-67-1 et seq., should be declared void and given no effect.

II. Whether the trial court erred in granting Cleary's motion for summary judgment.

A. The Affidavits

¶ 19. The plaintiffs argue that the trial court erred in granting Cleary summary judgment. They allege that the trial court improperly: (1) considered affidavits which were not delivered to opposite counsel until the day of the hearing, and (2) relied on the affidavits of state agency employees as being conclusive of the Department of Health's position that the Cleary Ordinance did not conflict with its rules and regulations. The only facts the trial court had before it at the hearing on summary judgment were contained in the affidavits of Kenn Munn, Michael Slaughter, and Ralph J. Turnbo, Jr. Despite this bare record,

Cleary claims that the chancellor properly considered the evidence before him and that his decision should be affirmed.

¶ 20. Turnbo's affidavit was filed with the Rankin County Chancery Clerk's office on April 2, 2003, and served via first class mail in compliance with M.R.C.P. 56(c). Yet, according to plaintiffs, neither their counsel nor the chancellor received this affidavit prior to the hearing. The chancellor was within his discretion in considering this affidavit in conjunction with the other affidavits and pleadings in ruling on the parties' motions. However, plaintiffs, charge that the chancellor's reliance on affidavits was erroneous in other regards.

¶ 21. Plaintiffs claim it was improper for the trial court to rely on the affidavits of Kenn Munn, Michael Slaughter, and Ralph Turnbo because none of them have the authority to speak on behalf of the Department of Health. They point to the case of *Mississippi Dep't of Env'tl. Quality v. Weems*, 653 So.2d 266 (Miss.1995), for the proposition that a governmental agency may only act through its official policies, rather than its employees. In *Weems*, the executive director of the Department of Environmental Quality attempted to provide guidance as to how the MDEQ interpreted permit transfers between certain entities. The chancellor, however, did not believe that the director had authority to bind the MDEQ, found that the MDEQ had not adopted rules and regulations to interpret the term "transfer," and stated that an agency such as the MDEQ "does not speak, nor set policy, through the letters of its Executive Director. It can only speak through its own official action." *Weems*, 653 So.2d at 273. *Weems* affirmed the chancellor's finding that the Commission of Environmental Quality's actions conflicted with the moratorium

statute on permit transfers and the chancellor's decision to remand the action to the appropriate administrative agencies to adopt rules and regulations necessary for the proper adjudication of the case. *Id.* at 273, 282-83.

¶ 22. Cleary has defended the charges brought by plaintiffs by not only stating that it has the authority to enact its ordinance but that such ordinance was adopted with approval of both the MDEQ and the Department of Health. These contentions are supported by various affidavits which the trial court stated it considered in rendering its judgment. Kenn Munn, who served as manager of the Cleary Water, Sewer and Fire District and was also the secretary on its Board of Commissioners, stated that the Department of Health recommended that Cleary adopt its ordinance, that he worked closely with both the Department of Health and the MDEQ in drafting the ordinance, and that the ordinance was adopted after receiving "review and comment" from both the Department of Health and the MDEQ. Cleary also introduced the affidavit of Michael Slaughter, a professional engineer. In his affidavit, Slaughter did presume not to speak on behalf of any government agency, rather he stated that it was his expert opinion that the Cleary Ordinance was an appropriate measure to protect the health of the residents who lived within the Cleary District. It is apparent that neither of these individuals has authority to speak for the Department of Health as to whether Cleary's Ordinance conflicts with any departmental rules or regulations.

¶ 23. However, as mentioned above, Cleary also introduced the affidavit of Ralph Turnbo, director of the Department of Health's Onsite Wastewater division. Turnbo stated in his affidavit that the Department of Health did recommend that Cleary adopt an ordinance and policy

regarding on-site wastewater systems, that members of the Department of Health, MDEQ, and the Cleary District met several times regarding this matter, that Cleary's ordinance did not "unlawfully encroach upon the authority of the Mississippi State Department of Health," and that the subject ordinance was adopted after review and comment of both the Department of Health and the MDEQ.

¶ 24. We find that the chancellor did not err in considering any of the affidavits before him; however, we do find that he erred in granting summary judgment, as neither the statements contained in those affidavits nor the pleadings in the record support such a decision in the instant case. Based on the record before this Court, there is a genuine issue of material fact as to whether the ordinance enacted by the Cleary District conflicts with rules and regulations adopted by the Department of Health. Consistent with *Weems*, a determination should be made as to whether Cleary's "Decentralized Wastewater Use Ordinance" offends any of the Department of Health's policies. Summary judgment was also inappropriate as to the "takings" argument raised by plaintiffs, and addressed below.

B. Takings.

¶ 25. Plaintiffs allege that enforcement of Cleary's Ordinance would be an unconstitutional taking of private property under both the federal and state constitutions. See U.S. Const. amend. V; U.S. Const. amend. XIV; Miss. Const. art. 3, § 17. This contention is based in large part on the "Decentralized Wastewater Policy & Procedures" document which accompanied one of the letters Cleary

sent to its customers. This document required property owners to: (1) provide proof, at their own expense, that their septic system is working properly; (2) if unable to provide that proof, they are required to install a new septic system approved by Cleary; (3) the cost for the inspection and/or installation is borne by the property owner; (4) the property owner is then required to deed ownership of the septic system to Cleary as well as grant Cleary an easement to inspect and service the septic system, all without compensation; and (5) the property owner must pay a monthly charge for maintaining the septic system that is now owned by Cleary.

¶ 26. Cleary states that the "Policy and Procedures" document it sent to customers was repealed prior to submission of the parties' cross-motions for summary judgment. To support this contention, Cleary references the supplemental affidavit of Kenn Munn, which was purportedly attached to Cleary's Motion for Summary Judgment. In this affidavit, Munn stated that the "Policy and Procedures" adopted in conjunction with Cleary's Ordinance were repealed and he further stated that the "Minutes of the Governing Authorities of the Cleary Water Sewer and Fire District," which reflected Cleary's actions, were attached to his affidavit as an exhibit.

¶ 27. Munn may have submitted Cleary's minutes as an exhibit; however, that exhibit is not attached to his affidavit in the trial record before this Court. We have been unable to locate the "Minutes of the Governing Authorities" in any of the documents in the record. As the chancellor made no specific findings of fact or conclusions of law in rendering his final judgment, there is no record before this Court indicating whether these challenged policies were in fact repealed, as Cleary contends, or are still in

force. Further, the lack of a developed record from the trial court prevents this Court from determining whether the chancellor even considered plaintiffs' takings claim in rendering his judgment, something the Court of Appeals likewise failed to address.

¶ 28. We find that a genuine issue of material fact exists as to the status of Cleary's "Policy and Procedures" provision and as to whether the lower courts addressed or passed on plaintiffs' "takings" claim. Summary judgment is therefore inappropriate in this case, and we find that the trial court erred in granting Cleary's motion and that the Court of Appeals erred in failing to address this "takings" issue on appeal.

CONCLUSION

¶ 29. This Court finds that Cleary does have the authority to enact its "Decentralized Wastewater Use Ordinance" under its general police powers; however, this ordinance must not run counter to the rules and regulations enacted by the Mississippi State Department of Health, which has statutory authority to regulate in this area under Miss.Code Ann. §§ 41-67-1 et seq. This Court also finds that the trial court erred in granting, and the Court of Appeals erred in affirming, Cleary's motion for summary judgment, as a genuine issue of material fact exists as to whether the Cleary Ordinance conflicts with Department of Health regulations. A genuine issue of material fact also exists regarding whether the "Policy and Procedures" provision which Cleary sent to district residents is still in effect and whether enforcement of the Cleary ordinance would constitute a taking without just compensation. Therefore, we reverse the judgments of the Court of

Appeals and the Rankin County Chancery Court, and we remand this case to the chancery court for further proceedings consistent with this opinion.

¶ 30. **REVERSED AND REMANDED.**

BEFORE THE CHANCERY COURT
OF RANKIN COUNTY, MISSISSIPPI

HAROLD GREEN ET AL

PLAINTIFFS

v.

Civil Action No.: 52041

CLEARY, WATER, SEWER
AND FIRE DISTRICT,

DEFENDANT

FINAL JUDGMENT

(Filed Apr. 23, 2003)

THERE CAME ON FOR HEARING, on April 4, 2003, the Motion of Cleary Water, Sewer and Fire District ("District") for Summary Judgment and the Cross-Motion of the Plaintiffs Harold Green et al, joined by the Plaintiff/Intervener the City of Richland, Mississippi, ("Richland") for Summary Judgment. The Court having considered the Motions, the Affidavits and other materials on file, and the written and oral arguments of counsel for the Parties, FINDS AND ORDERS as follows:

1.

The Court has jurisdiction over the parties and subject matter of the action. The Court sits as a Special Chancellor duly appointed by the Supreme Court of Mississippi.

2.

The pleadings, affidavits, and other materials on file show that there is no genuine issue as to any material fact and that the District is entitled to a judgment as a matter of law. The Motion of the District for Summary Judgment is well taken and should be, and hereby is, granted. The District has the power and authority to

enact its "Decentralized Waste Water Ordinance." Said Ordinance is proper and is fully enforceable. The injunction previously put in place by the Court is lifted and vacated.

3.

The Motion of Green et al, as joined by Richland, is not well taken and should be, and hereby is denied.

SO ORDERED this the 17th day of April, 2003.

/s/ Jason Floyd
Special Chancellor

Presented by:

/s/ James Bobo
James A. Bobo,
Attorney for Cleary Water,
Sewer and Fire District

A-20

892 So.2d 824

Supreme Court of Mississippi
Harold Green

v.

Cleary Water, Sewer & Fire District
NO. 2003-CT-01062-SCT

January 27, 2005

Disposition: Granted.

910 So.2d 1

Court of Appeals of Mississippi.

Harold GREEN, et al., and
City of Richland, Mississippi, Appellants

v.

CLEARY WATER, SEWER & FIRE DISTRICT, Appellee.

No. 2003-CA-01062-COA.

Aug. 3, 2004.

Rehearing Denied Oct. 26, 2004.

Jay Max Kilpatrick, Paul B. Henderson, Jackson,
David Ringer, and Michael D. Caples, Jackson, attorneys
for appellants.

James A. Bobo, Pearl, attorney for appellee.

EN BANC.

KING, C.J., for the Court.

¶ 1. On August 23, 2002, 123 residents of Rankin County, brought suit against the Cleary Water, Sewer, & Fire District. On September 3, 2002, the City of Richland was granted a motion to intervene. The residents, and the City, were seeking a declaratory judgment and injunctive relief against the District. On April 17, 2003, Special Chancellor Jason H. Floyd, Jr. granted the District's motion for summary judgment. Aggrieved by this dismissal, co-appellants Green, and the City have perfected their appeal. Green and the City of Richland filed separate briefs, and the following issues were addressed, which we quote verbatim:

By co-appellant Green:

I. Whether the Cleary Water, Sewer & Fire District has the express statutory authority or jurisdiction to enact an ordinance regulating the use, repair, maintenance and operation of an "Individual On-Site Wastewater Disposal System."

II. Whether the "Decentralized Wastewater Use Ordinance" enacted by the Cleary Water, Sewer & Fire District is preempted by the Mississippi Legislative enactment of the Mississippi Individual On-Site Wastewater Disposal System Law as codified at the Mississippi Code, Annotated, Section 41-67-1, *et seq.*, and the Mississippi Department of Health regulations governing Individual On-site Wastewater Disposal Systems.

III. Whether the ordinance as enacted constitutes a taking of personal property without just compensation as protected by the Fifth Amendment of the Constitution of the United States of America and Article 3 Section 17 of the Constitution of the State of Mississippi.

IV. Whether the Chancellor committed reversible error in considering the affidavits not delivered to counsel opposite the day prior to hearing and not received by counsel opposite minutes prior to the hearing.

V. Whether the Chancellor committed reversible error in relying on affidavits of employees of state agencies as speaking on behalf of the State of Mississippi and legal conclusions that the ordinance in question did not conflict with the Department of Health regulations.

By co-appellant City of Richland:

I. Whether the Cleary Water, Sewer, & Fire District has the express statutory authority and/or jurisdiction to enact an ordinance regulating the use, repair, maintenance and operations of an "Individual On-Site Wastewater Disposal System."

II. Whether the Ordinance enacted by the Cleary Water, Sewer, & Fire District is preempted by the Mississippi Individual On-Site Wastewater Disposal System law as codified at Mississippi Code Ann. § 41-67-1 *et seq.*

We will not address the issues as they were presented, as the following restated issue is dispositive of the case.

**Whether the Cleary Water, Sewer &
Fire District had the statutory
authority to enact the Ordinance.**

STATEMENT OF FACTS

¶ 2. Pursuant to Mississippi Code Annotated Sections 19-5-151-207, the Rankin County Board of Supervisors adopted a resolution fixing January 16, 1977, as the date for the creation of the Cleary Sewer District. On May 16, 1980, the Governor of the State of Mississippi approved local and private legislation which created the Cleary Heights Water and Sewer District. The legislation provided that "[h]ereafter . . . the Cleary Heights Water and Sewer District . . . shall have all powers granted to a water and sewer district under the provisions of Mississippi Code Annotated Sections 19-5-151 through 19-5-257, Mississippi Code of 1972, as now or hereafter amended, whether or not such powers were enumerated in the resolution of the board of supervisors creating the Cleary

Heights Sewer District." In 1986, the District adopted a resolution to combine its operations with the Cleary Fire Protection District and to continue joint operations under the name Cleary, Water, Sewer and Fire District. The District provides potable water, and waste water disposal to a large area located in southwest Rankin County.

¶ 3. Personnel employed by the District routinely observed untreated or under-treated waste sewage being discharged upon the ground within the District on properties which have on-site waste water treatment systems. By 2000, this problem, coupled with increased population growth within the District, caused the Mississippi State Department of Health (MDH) to recommend that the District investigate the regulation of sewage through an ordinance regulating on-site waste water systems (septic tanks). The District met with personnel from the MDH and Mississippi Department of Environmental Quality (MDEQ) to develop regulations to address the discharge of waste water in the district. The draft of the proposed Ordinance was sent to both the MDH and the MDEQ for review and comment. The MDEQ informed the District by letter of their support of the "District's adoption of such an ordinance and believe it will provide needed additional protection of the environment."

¶ 4. After a review of the Ordinance by MDEQ and MDH, the District published a "Notice of Public Hearing," regarding the proposed Ordinance, in *The Rankin County News*. The Notice was also posted in three public places within the District. A public hearing was held, and there were no objections to the adoption of the Ordinance.

¶ 5. On June 14, 2001, the District adopted the "Decentralized Wastewater Use Ordinance." The purpose of the

Ordinance was to regulate the use and repair of individual on-site wastewater disposal systems. The Ordinance required that customers with individual on-site wastewater disposal systems have them inspected and where necessary repaired to comply with the Ordinance.

¶ 6. In an effort to get compliance with the Ordinance, the District mailed three letters to customers with individual on-site wastewater disposal systems. These letters advised customers that their failure to comply with the Ordinance would result in the District turning off their potable water supply.

¶ 7. On August 23, 2002, about 123 residents of the District filed suit in the Chancery Court of Rankin County seeking a declaratory judgment and injunctive relief against the District. The residents argued that the District did not have statutory authority to enact an Ordinance regulating individual on-site wastewater disposal systems, and the residents sought to have the Ordinance declared void. The residents also requested an injunction to prevent the District from disengaging water service to individuals who refused to comply with the Ordinance.

¶ 8. On August 23, 2002, an order of recusal was issued by Rankin County Chancellors John S. Grant III and Thomas L. Zebert. On August 27, 2002, the Mississippi Supreme Court appointed special chancellor Jason H. Floyd, Jr. to preside over the proceedings.

¶ 9. On September 3, 2002, the City of Richland filed a motion to intervene, contending that the District did not have authority to regulate individual on-site wastewater systems. On the same day the Chancellor granted Green's motion for a preliminary injunction, and the City's motion to intervene.

¶ 10. On September 18, 2002, the District removed the suit to the United States District Court for the Southern District of Mississippi, alleging that the complaint sought to have the Ordinance declared unconstitutional, thereby creating a federal question. On October 18, 2002, Green, filed a motion to remand, contending the federal constitutional question was merely speculative. On January 13, 2003, U.S. District Judge William Barbour, Jr. granted Green's motion to remand the case to the Chancery Court of Rankin County.

¶ 11. On January 26, 2003, the District filed a motion to dismiss, or in the alternative for summary judgment, and for other relief. On February 10, 2003, Green responded to the motion to dismiss and filed his own motion for summary judgment. On March 5, 2003, the District filed its response to Green's motion for summary judgment.

¶ 12. On April 2, 2003, the District submitted the affidavit of Ralph R. Turnbo, Jr., the director of the Division of Onsite Wastewater with the Mississippi State Department of Health, which stated that the Ordinance, "does not unlawfully encroach upon the authority of the Mississippi Department of Health." On April 17, 2003, Chancellor Floyd granted the District's motion for summary judgment, without opinion. Aggrieved, Green appeals to this Court.

ISSUE AND ANALYSIS

Whether the Cleary Water, Sewer & Fire District had the statutory authority to enact the Ordinance.

¶ 13. Neither party disputes that the District's power to regulate is governed by statute. However, the conflict

arises over which statute is applicable. Green contends that the trial court erred in denying his motion for summary judgment because the District lacked statutory authority, or jurisdiction, to regulate individual on-site wastewater disposal systems. Green argues that Mississippi Code Annotated Section 19-5-173¹ grants general powers to the District, but it does not expressly or impliedly grant the District jurisdiction over the use, repair, maintenance, or operation of individual on-site wastewater disposal systems. Moreover, Green contends that the Ordinance is preempted by the Mississippi Individual On-Site Wastewater Disposal System Law codified in Mississippi Code Annotated Sections 41-67-1-31, as it grants the Mississippi State Department of Health sole authority over individual wastewater systems. See Miss.Code Ann. § 41-67-3(1)².

¹ Miss.Code Ann. § 19-5-173 (Rev.2003) **Board of commissioners; power to enact regulations.** The board of commissioners shall have the power to make regulations to secure the general health of those residing in the district; to prevent, remove and abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools, and to regulate or suppress those already constructed; and to compel and regulate the connection of all property with sewers.

² Miss.Code Ann. § 41-67-3(1) (Rev.2001) **Duties and responsibilities.** (1) The State Board of Health shall have the following duties and responsibilities:

- (a) To exercise general supervision over the design, construction, operation and maintenance of individual on-site wastewater disposal systems with flows substantially equivalent to a single family residential generator, except when the property owner or lessee chooses to employ a professional engineer to comply with this chapter. To effectively administer this law, the department and the Department of Environmental Quality shall enter into a memorandum of understanding, which at a minimum shall clearly define the jurisdiction of each department with regard to wastewater

(Continued on following page)

¶ 14. The City of Richland contends that pursuant to Mississippi Code Annotated Sections 41-67-1-31, the Legislature vested sole authority over individual on-site wastewater disposal systems in the Mississippi State Department of Health. Moreover, it contends the Legislature provided that only municipalities or a board of supervisors could adopt legislation similar to that in the Mississippi On-Site Wastewater Disposal System Law. *See*

disposal and procedures for interdepartmental interaction and cooperation;

(b) To adopt, modify, repeal and promulgate rules and regulations, after due notice and hearing, and where not otherwise prohibited by federal or state law, to make exceptions to, to grant exemptions from and to enforce rules and regulations implementing or effectuating the duties of the board under this chapter to protect the public health. The board may grant variances from rules and regulations adopted under this chapter, including requirements for buffer zones, or from setbacks required under Section 41-67-7 where the granting of a variance shall not subject the public to unreasonable health risks or jeopardize environmental resources;

(c) To provide or deny certification for persons engaging in the business of the design, construction or installation of individual on-site wastewater disposal systems and persons engaging in the removal and disposal of the sludge and liquid waste from those systems;

(d) To suspend or revoke certifications issued to persons engaging in the business of the design, construction or installation of individual on-site wastewater disposal systems or persons engaging in the removal and disposal of the sludge and liquid waste from those systems, when it is determined the person has violated this chapter or applicable rules and regulations; and

(e) To require the submission of information deemed necessary by the department to determine the suitability of individual lots for individual on-site wastewater disposal systems.

Miss.Code Ann. § 41-67-15 (Rev.2001)³. The City contends, as Green, that the Ordinance is preempted by the Mississippi Individual On-Site Wastewater Disposal System Law.

¶ 15. The District contends that the Ordinance is not preempted by Mississippi Code Annotated Sections 41-67-1-31 and moreover the Ordinance was enacted pursuant to Mississippi Code Annotated Section 19-5-173. The District contends the Ordinance was adopted pursuant to Mississippi Code Annotated Section 19-5-173, as a regulation to "secure the general health" of residents of the District. As the supplier of potable water, the District contends that the health of those in the district was threatened by untreated or under-treated waste water observed by District personnel on private properties with on-site waste water treatment systems. The District contends that the Ordinance was enacted merely as a safety precaution to prevent the discharge of untreated waste water into the surface and ground water supplied by the District, thereby endangering the health and safety of its customers. The District also contends that the Ordinance was adopted by the suggestion of the MDH, and that the MDEQ and MDH both approved of the Ordinance. Finally, the District contends that the affidavit of Ralph R. Turnbo, Jr. the MDH Director of the Division of Onsite Wastewater Management, states that the Ordinance does not conflict,

³ Miss.Code Ann. § 41-67-15 (Rev.2001) **Authority of municipalities and boards of supervisors to adopt more restrictive ordinances not impaired.** Nothing in this chapter shall limit the authority of a municipality or board of supervisors to adopt similar ordinances which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern.

or usurp, the authority of the Mississippi State Department of Health.

¶ 16. The Mississippi Supreme Court has recognized that “[t]he police power confers upon the states and local governmental units broad regulatory authority over public health, welfare, and morals.” *Collins v. City of Hazlehurst*, 709 So.2d 408, 412 (Miss.1997); citing *Davidson v. City of Clinton, Mississippi*, 826 F.2d 1430, 1433 (5th Cir.1987). In *Collins*, the Court upheld a city ordinance that was more restrictive than the state statute pertaining to the sale of alcohol.

¶ 17. The Mississippi Supreme Court has also said:

that any exercise of police power is valid if it has for its object the protection and promotion of the public health, safety, morality or welfare, if it is reasonably related to the attainment of that object, and if it is not oppressive, arbitrary or discriminatory. (citations omitted) In other words, when governmental entities act pursuant to their police powers, and in the absence of a binding agreement, they are free to conduct their affairs in a manner consistent with their best interests provided their actions are reasonably related to the attainment of those interests and are not arbitrary, oppressive or discriminatory.

Hollywood Cemetery Ass’n v. Board of Mayor and Selectman of City of McComb City, 760 So.2d 715, 719 (¶ 13) (Miss.2000).

¶ 18. As the District acted under the authority of its general police powers we find that the Ordinance is a valid exercise of its authority. See Miss.Code Ann. § 19-5-173 (Rev.2003). The Mississippi On-Site Wastewater

Disposal System Law, while not mentioning sewer districts, does not expressly prevent sewer districts from regulating the use or maintenance of individual on-site wastewater disposal systems. *See* Miss.Code Ann. §§ 41-67-1-31(Rev.2001). Furthermore, Mississippi Code Annotated Sections 41-67-1-31, ("Mississippi On-Site Wastewater Disposal System Law") did not repeal Mississippi Code Annotated Section 19-5-173 (which confers upon the board of commissioners power to regulate the general health of those residing in the district), and cannot be read as such. The District must be given the ability to protect the potable water that it supplies to its customers through regulations protecting the health of these customers.

¶ 19. Finally, the Ordinance was adopted at the request of the Mississippi State Department of Health, the agency given the authority under the Mississippi Individual On-Site Wastewater Disposal System Law over wastewater disposal systems. *See* Miss.Code Ann. § 41-67-3(1) (Rev.2001). The Ordinance was adopted with the express approval of the MDH and MDEQ, and as such we do not find that the District usurped its authority under Mississippi Code Annotated Section 19-5-173.

¶ 20. This Court has a well-established, and very familiar, standard of review of a trial court's grant of summary judgment:

This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it—admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine

issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt.

Williamson ex rel. Williamson v. Keith, 786 So.2d 390, 393 (¶ 10) (Miss.2001) (citations omitted).

¶ 21. We find that there were no material disputed issues of fact, and that the District acted in accordance with its police power pursuant to Mississippi Code Annotated Section 19-5-173. Accordingly, we do not find that chancellor erred in granting summary judgment to the District.

¶ 22. THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

IRVING, MYERS, AND CHANDLER, JJ., CONCUR.
GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN
OPINION JOINED BY LEE, J. BRIDGES AND SOUTHWICK, P.JJ., NOT PARTICIPATING.

GRIFFIS, J., Dissenting.

¶ 23. I am of the opinion that the majority has incorrectly determined that the Cleary Water, Sewer & Fire District had the statutory authority to regulate individual on-site wastewater disposal systems and that the Mississippi Individual

On-Site Wastewater Disposal Law does not preempt the regulation of individual on-site wastewater disposal systems. Therefore, I respectfully dissent.

¶ 24. In *Lepre v. D'Iberville Water and Sewer Dist.*, 376 So.2d 191, 194 (Miss.1979), the Mississippi Supreme Court held that a water/sewer district may only exercise such powers as are expressly delegated to it by the legislature.

¶ 25. The appellants argue that the District's authority is derived from Mississippi Code Annotated §§ 19-5-151-257 (Rev.2003) and is limited by the following statement of the District's general powers:

Districts . . . shall have the powers enumerated in the resolution of the board of supervisors creating such districts **but shall be limited to the conducting and operating of a water supply system, a sewer system, . . . or a combined water and sewer system, . . . and to carry out such purpose or purposes, such districts shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain, and operate such system or systems. . . .**

Miss.Code Ann. § 19-5-175 (Rev.2003) (emphasis added). The District argues that its authority is much broader and that its authority to enact the ordinance comes from Mississippi Code Annotated § 19-5-173 (Rev.2003), which provides: The board of commissioners shall have the power to make regulations to secure the general health of those residing in the district; to prevent, remove and abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools, and to regulate or suppress those already constructed; and to compel and regulate the connection of all property with sewers.

¶ 26. Mississippi Code Annotated Section 19-5-175 (Rev.2003) expressly limits the District's authority to "sewer systems." Mississippi Code Annotated Section 49-17-5(c) (Rev.2003) sets forth a definition of a "sewerage system" to mean "pipelines or conduits, pumping stations, and force mains, and other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal." I can find no definition, either statutory or otherwise, that would suggest that a sewer system includes individual on-site wastewater disposal systems or septic tanks.

¶ 27. Clearly, the legislature recognized a difference between sewer systems and septic tanks by enacting the Mississippi Individual On-Site Wastewater Disposal System Law. Miss.Code Ann. §§ 41-67-1 et seq. (Rev.2001). The Mississippi Individual On-Site Wastewater Disposal System Law provides for a comprehensive statutory scheme for regulating septic tanks. Miss.Code Ann. § 41-67-3(1) (Rev.2001). The legislature specifically granted the power to promulgate rules and regulations regarding septic tanks to the Mississippi State Board of Health. Miss.Code Ann. §§ 41-67-3(1)(b) and 41-67-3(4) (Rev.2001).

¶ 28. The majority rejects the statutory limitations on the District's powers, as established in Mississippi Code Annotated Section 19-5-175 (Rev.2003), and bases its decision on the general police powers of Mississippi Code Annotated Section 19-5-173 (Rev.2003). Section 19-5-173 grants regulatory power to the District to: (1) make regulations to secure the general health of residents in a district; (2) prevent, remove and abate nuisances; (3) regulate or prohibit construction of privy-vaults and cesspools; (4) regulate or suppress privy-vaults or cesspools already constructed; and (5) compel and regulate the

connection of all property with sewers. The District's ordinance does not relate to any type of nuisance and it does not attempt to connect all property with sewers. Privy-vaults and cesspools refer to outhouses and other structures that retain sewage but provide little or no treatment before releasing the sewage to the surrounding area. Thus, the majority determines that the ordinance was enacted to secure the general health of residents.

¶ 29. The Mississippi Individual On-Site Wastewater Disposal System Law ensures that individual on-site wastewater disposal systems (septic tanks) are properly designed, constructed, operated and maintained. Miss.Code Ann. § 41-67-3(1)(a) (Rev.2003). The legislature granted the State Board of Health with primary responsibility over septic tanks and specifically authorized the Mississippi Department of Environmental Quality to assist in the administration of the State Board of Health's responsibilities and clearly defined each department's role and responsibilities in overseeing the use of septic tanks. *Id.* Thus, by statutory enactment, the State Board of Health and the Mississippi Department of Environmental Quality have the responsibility to ensure that septic tanks do not adversely affect the general health of residents. *Id.*

¶ 30. In Mississippi Code Annotated Section 41-67-15 (Rev.2003), the legislature determined that "nothing in this chapter [the Mississippi Individual On-Site Wastewater Disposal System Law] shall limit the authority of a municipality or board of supervisors to adopt similar ordinances which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern." The District is neither a municipality nor a board of supervisors. Accordingly, the Mississippi Individual On-Site Wastewater Disposal

System Law preempts the regulation of individual on-site wastewater disposal systems, or septic tanks, by the District. As such, the District had no authority to promulgate rules and regulations regarding septic tanks.

¶ 31. In conclusion, the individual appellants are not served by the District's centralized sewer system. As a result, they are required to install an individual septic tank pursuant to the rules and regulations of the State Board of Health. If the District were to install a centralized sewer system to everyone within its boundaries, then the District would have the statutory authority to require that every resident be connected to the District's system. Through the enactment of this ordinance, I find that the District has acted beyond its jurisdictional bounds and has no authority to regulate individual on-site wastewater disposal systems, and the chancellor erred as a matter of law in granting the summary judgment in favor of the District.

LEE, J., JOINS THIS SEPARATE OPINION.

IN THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

HAROLD GREEN, HELEN M
GREEN, DONALD L. GREEN,
JANET GREEN, CHARLES E. REIS,
BARBARA J. REIS, CHARLES B.
REIS, JIMMY BOMER, KATHY
BOMER, RAMONA MAXINE
BOMER, KENNETH W. HARRISON,
JOHNNIE MAE HARRISON,
RAMONA MCDONALD, LOUIE
COOPER, JOSEPH E. WEBB,
LOIS WEBB, MICHAEL STEEN,
CHANTAY STEEN, ROGER G.
KELLY, SHIRLEY KELLY,
STEPHANIE COLLINS,
GLYNNE TULLOS, BETTY S.
TULLOS, SHEILA R. LEE,
CHARLES A. CROSSER,
TREY BOYD, LISA BOYD,
JAMES J. FITZPATRICK,
JUDITH FITZPATRICK,
FRANCES PHILLIPS RAY,
ROBERT PAUL HAMNER,
LARRY G. WIGLEY, WALTER L.
MORRIS, CHERYL L. MORRIS,
JAMES PARISH, GRADY
MAHAFFEY, SHAWN BYRD,
APRIL P. WOODS, KATHY M.
HORNE, SHELBY LYNCHARD JR.,
EVELYN LYNCHARD, CLYDE J.
MONROE, MERLE Y. MONROE,
PAUL F. ROBINSON, JOY E.
ROBINSON, ROBERT J. CRAFT,
SHEILA CRAFT, LESLIE M.

SIVILS, DELORES GRUBE,
FRANCIS H. BROOME, WARREN
N. RICE, DORIS F. RICE, JEFF W.
RICE, JANN R. RICE, LOUISE
BURKE, JAMES M. FLETCHER,
CINDY FLETCHER, CHARLES
BURNS, ELSIE BURNS, MARION
A. GRAY, CAROLYN GRAY, JAMES
N. WHITE, FAYE C. WHITE,
CLYDE DAVIS, GEORGE HAYES,
MARY L. HAYES, CORA COUSIN,
IDA M. LOVE, JANICE E. GIPSON,
JOHNNIE R. McGEE, MOSES J.
McGEE, EDMOND L. TEASLEY
SR., SHARON K. TEASLEY, ED
BOWLIN, ANNE BOWLIN, EMILY
J. BOWLIN, WAYNE WILSON,
JEFFREY R. MORAN, SHEILA E.
MORAN, JOHN APPLEWHITE,
SIDNEY PAUL BOTELER, MIKE
HALL, SCOTT HIGDON, JOHN
MIMS, NEWTON ROBERTS,
GERALD WOOD, JANIE A. COOK,
TIFFANY A. COOK, BILLY B.
HARRIS, ALLIE R. HARRIS,
BOBBY JEAN THOMAS, ELSIE
DOWNING (BACON), TROY RAY,
JACK D. WOOD, WALTER J.
SHAW JR., JACKIE SHAW, JAMES
HOWELL, MICHAEL A. EVANS,
DONALD BRIDGES, REV. R.
ANDREW FOURNIER, GIBSON
PHILLIPS, GEORGE QUILLEN,
MICHAEL H. GARDNER,
CHARLES W. THOMAS, BOBBY
DOWNING, PAUL W. OSWALT,
MARTHA D. OSWALT, ELEANOR
JOHNSON, ROBERT D.

DOWNING, JOE DAVENPORT,
JAMES A. JOHNSON, R. D.
DOWNING, JIMMIE D. MARTIN,
DONNA DOWNING, PENNY
RENFROE, RICK L. PHILLIPS,
IVY L McNABB, WILMA L
McNABB, HOWARD L. CORLEY,
STEPHEN L. CORLEY, FREDNA
CORLEY, DONALD LEE SIMMONS,
and AGNES L. SIMMONS

PLAINTIFFS

V.

CAUSE NO. 52041

CLEARY WATER, SEWER & FIRE
DISTRICT

DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR INJUNCTIVE AND OTHER
RELIEF, FIRST SET OF INTERROGATORIES,
FIRST SET OF REQUESTS FOR ADMISSIONS,
AND FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

(Filed Aug. 23, 2002)

COME NOW, Plaintiffs, by and through their attorney of record and file this their Complaint for Declaratory Judgment and for Injunctive Relief, and Other Relief, and for cause, would show unto the Court the following, to-wit:

I.

The Defendant is a water, sewer and fire district, which appears to have been created by the Rankin County Board of Supervisors on or about November 5, 1979, consistent with that which is recorded in Rankin County Board of Supervisors Book 047, Page 567, and it may be

served with the process of this Court by service on Kenneth Johnson, Chairman of the Board of Commissioners, whose address is 2263 Cleary Road, Florence, Mississippi.

II.

The Plaintiffs:

Harold Green, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 558 Mullican Road, Florence, MS 39073;

Helen M. Green, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 558 Mullican Road, Florence, MS 39073;

Donald L. Green, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 552 Mullican Road, Florence, MS 39073;

Janet Green, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 552 Mullican Road, Florence, MS 39073;

Charles E. Reis, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 520 Mullican Road, Florence, MS 39073;

Barbara J. Reis, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 520 Mullican Road, Florence, MS 39073;

Charles B. Reis, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 520 Mullican Road, Florence, MS 39073;

Jimmy Bomer, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 532 Mullican Road, Florence, MS 39073;

Kathy Bomer, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 532 Mullican Road, Florence, MS 39073;

Ramona Maxine Bomer, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 532 Mullican Road, Florence, MS 39073;

Kenneth W. Harrison, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 514 Mullican Road, Florence, MS 39073;

Johnnie Mae Harrison, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 514 Mullican Road, Florence, MS 39073;

Ramona McDonald, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 528 Mullican Road, Florence, MS 39073;

Louie Cooper, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 527 Mullican Road, Florence, MS 39073;

Joseph E. Webb, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 515 Mullican Road, Florence, MS 39073;

Lois Webb, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 515 Mullican Road, Florence, MS 39073;

Michael Steen, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 521 Mullican Road, Florence, MS 39073;

Chantay Steen, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 521 Mullican Road, Florence, MS 39073;

Roger G. Kelly, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 219 Florence Circle, Florence, MS 39073;

Shirley Kelly, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 219 Florence Circle, Florence, MS 39073;

Stephanie Collins, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 219 Florence Circle, Florence, MS 39073;

Glynne Tullos, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 500 Mullican Road, Florence, MS 39073;

Betty S. Tullos, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 500 Mullican Road, Florence, MS 39073;

Sheila R. Lee, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 164 Florence Circle, Florence, MS 39073;

Charles A. Crosser, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 185 Florence Circle, Florence, MS 39073;

Trey Boyd, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 555 Mullican Road, Florence, MS 39073;

Lisa Boyd, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 555 Mullican Road, Florence, MS 39073;

James J. Fitzpatrick, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 737 Mullican Road, Florence, MS 39073;

Judith Fitzpatrick, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 737 Mullican Road, Florence, MS 39073;

Frances Phillips Ray, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 896 Mullican Road, Florence, MS 39073;

Robert Paul Hamner, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2343 Cleary Road, Florence, MS 39073;

Larry G. Wigley, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 677 Mullican Road, Florence, MS 39073;

Walter L. Morris, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 125 E. Eagle Ridge Drive., Florence, MS 39073;

Cheryl L Morris, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 125 E. Eagle Ridge Drive., Florence, MS 39073;

James Parish, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 115 Modena Lane., Florence, MS 39073;

Grady Mahaffey, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 126 Modena Lane., Florence, MS 39073;

Shawn Byrd, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 156 Modena Lane., Florence, MS 39073;

April P. Woods, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 112 Modena Lane, Florence, MS 39073;

Kathy M. Horne, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 139 Florence Circle, Florence, MS 39073;

Shelby Lynchard Jr., an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 200 Florence Circle, Florence, MS 39073;

Evelyn Lynchard, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 200 Florence Circle, Florence, MS 39073;

Clyde J. Monroe, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 196 S. Eagle Ridge Drive, Florence, MS 39073;

Merle Y. Monroe, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 196 S. Eagle Ridge Drive, Florence, MS 39073;

Paul F. Robinson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 214 S. Eagle Ridge Drive, Florence, MS 39073;

Joy E. Robinson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 214 S. Eagle Ridge Drive, Florence, MS 39073;

Robert J. Craft, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 174 S. Eagle Ridge Drive, Florence, MS 39073;

Sheila Craft, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 174 S. Eagle Ridge Drive, Florence, MS 39073;

Leslie M. Sivils, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 208 S. Eagle Ridge Drive, Florence, MS 39073;

Delores Grube, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 165 E. Eagle Ridge, Florence, MS 39073;

Francis H. Broome, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1810 Cleary Road, Florence, MS 39073;

Warren N. Rice, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1925 Cleary Road, Florence, MS 39073;

Doris F. Rice, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1925 Cleary Road, Florence, MS 39073;

Jeff W. Rice, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1931 Cleary Road, Florence, MS 39073;

Jann R. Rice, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1931 Cleary Road, Florence, MS 39073;

Louise Burke, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1920 Cleary Road, Florence, MS 39073;

James M. Fletcher, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1903 Cleary Road, Florence, MS 39073;

Cindy Fletcher, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1903 Cleary Road, Florence, MS 39073;

Charles Burns, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1822 Cleary Road, Florence, MS 39073;

Elsie Burns, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1822 Cleary Road, Florence, MS 39073;

Marion A. Gray, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 207 S. Eagle Ridge Drive, Florence, MS 39073;

Carolyn Gray, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 207 S. Eagle Ridge Drive, Florence, MS 39073;

James N. White, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 143 Eagle Ridge Drive, Florence, MS 39073;

Faye C. White, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 143 Eagle Ridge Drive, Florence, MS 39073;

Clyde Davis, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2413 Cleary Road, Florence, MS 39073;

George Hayes, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2403 Cleary Road, Florence, MS 39073;

Mary L. Hayes, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2403 Cleary Road, Florence, MS 39073;

Cora Cousin, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2401 Cleary Road, Florence, MS 39073;

Ida M. Love, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2396 Cleary Road, Florence, MS 39073;

Janice E. Gipson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2396 Cleary Road, Florence, MS 39073;

Johnnie R. McGee, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2400 Cleary Road, Florence, MS 39073;

Moses J. McGee, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2400 Cleary Road, Florence, MS 39073;

Edmond L. Teasley Sr., an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2338 Cleary Road, Florence, MS 39073;

Sharon K. Teasley, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2338 Cleary Road, Florence, MS 39073;

Ed Bowlin, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 181 S. Eagle Ridge Drive, Florence, MS 39073;

Anne Bowlin, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 181 S. Eagle Ridge Drive, Florence, MS 39073;

Emily J. Bowlin, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 181 S. Eagle Ridge Drive, Florence, MS 39073;

Wayne Wilson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2352 Cleary Road, Florence, MS 39073;

Jeffrey R. Moran, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 213 S. Eagle Ridge Drive, Florence, MS 39073;

Sheila E. Moran, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 213 S. Eagle Ridge Drive, Florence, MS 39073;

John Applewhite, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1970 Cleary Road, Florence, MS 39073;

Sidney Paul Boteler, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1984 Cleary Road, Florence, MS 39073;

Mike Hall, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1957 Cleary Road, Florence, MS 39073;

Scott Higdon, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1982 Cleary Road, Florence, MS 39073;

John Mims, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2008 Cleary Road, Florence, MS 39073;

Newton Roberts, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1959 Cleary Road, Florence, MS 39073;

Gerald Wood, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 2026 Cleary Road, Florence, MS 39073;

Janie A. Cook, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 141 N. Eagle Ridge Drive, Florence, MS 39073;

Tiffany A. Cook, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 141 N. Eagle Ridge Drive, Florence, MS 39073;

Billy B. Harris, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 154 S. Eagle Ridge Drive, Florence, MS 39073;

Allie R. Harris, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 154 S. Eagle Ridge Drive, Florence, MS 39073

Bobby Jean Thomas, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1750 Cleary Road, Florence, MS 39073;

Elsie Downing (Bacon), an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 131 River Bend Lane, Florence, MS 39073;

Troy Ray, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 109 Slipaway Lane, Florence, MS 39073;

Jack D. Wood, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1687 Cleary Road, Florence, MS 39073;

Walter J. Shaw Jr., an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1611 Cleary Road, Florence, MS 39073;

Jackie Shaw, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1611 Cleary Road, Florence, MS 39073;

James Howell, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1721 Cleary Road, Florence, MS 39073;

Michael A. Evans, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1597 Cleary Road, Florence, MS 39073;

Donald Bridges, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is P. O. Box 727, Florence, MS 39073;

Rev. R. Andrew Fournier, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1633 Cleary Road, Florence, MS 39073;

Gibson Phillips, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 581 Cleary Road, Richland, MS 39218;

George Quillen, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1631 Cleary Road, Florence, MS 39073;

Michael H. Gardner, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1615 Cleary Road, Florence, MS 39073;

Charles W. Thomas, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 122 Thomas Terrace, Florence, MS 39073;

Bobby Downing, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1740 Cleary Road, Florence, MS 39073;

Paul W. Oswalt, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1809 Cleary Road, Florence, MS 39073;

Martha D. Oswalt, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1809 Cleary Road, Florence, MS 39073;

Eleanor Johnson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1628 Cleary Road, Florence, MS 39073;

Robert D. Downing, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1736 Cleary Road, Florence, MS 39073;

Joe Davenport, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1620 Cleary Road, Florence, MS 39073;

James A. Johnson, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 116 Slipaway Lane, Florence, MS 39073;

R. D. Downing, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1904 Cleary Road, Florence, MS 39073;

Jimmie D. Martin, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 106 Southwind, Richland, MS 39218;

Donna Downing, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 1744 Cleary Road, Florence, MS 39073;

Penny Renfroe, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 904 Mullican Road, Florence, MS 39073;

Rick L. Phillips, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 904 Mullican Road, Florence, MS 39073;

Ivy L. McNabb, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 168 So. Eagle Ridge Florence, MS 39073;

Wilma L. McNabb, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 168 So. Eagle Ridge Florence, MS 39073;

Howard L. Corley, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 200 So. Eagle Ridge Florence, MS 39073;

Stephen L. Corley, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 200 So. Eagle Ridge Florence, MS 39073;

Fredna Corley, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 200 So. Eagle Ridge Florence, MS 39073;

Donald Lee Simmons, an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 222 So. Eagle Ridge Florence, MS 39073;

Agnes L., an adult resident citizen and registered voter in Rankin County, Mississippi, whose address is 222 So. Eagle Ridge Florence, MS 39073;

III.

The Defendant took the following actions:

Purported to ordain an Ordinance, a copy of which is attached as Exhibit "A";

Issued a letter to its constituents on September 14, 2001, a copy of which is attached as Exhibit "B;

Issued a letter to its constituents on March 20, 2002, a copy of which is attached as Exhibit "C";

Issued a letter to its constituents on June 5, 2002, a copy of which is attached as Exhibit "D".

IV.

Plaintiffs ask that the Chancery Court declare this action invalid for reasons including:

It is unconstitutional;

It is pre-empted by other state police power that is, in the premises, exclusive;

The power is outside the ambit of the statutes with which the water and sewer district is created;

The power sought to be exercised is outside the ambit of the powers enumerated in the creation of the water system;

The Cleary Water and Sewer District is not validly conformed;

The Cleary Water and Sewer District does not have valid appointees acting in its behalf;

The Cleary Water and Sewer District has not granted appropriate statutory notice in order to purport to take the sort of actions that are set out in Exhibit "A";

The action of the Cleary Water and Sewer District is inequitable;

The action sought to be taken by the Cleary Water and Sewer District is unconscionable;

The action sought to be taken by the Cleary Water and Sewer District, in coercion by threat of cutting off water, a basic need of life for which your Petitioners have no other source, if they do not comply with the purported requirements, is wrong.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court will:

Enter a Declaratory Judgment in which it declares that the Cleary Water, Sewer & Fire District may require nothing of those property holders who have septic systems and sanitation systems that have been duly approved by the Rankin County Board of Health, unless and until the Cleary Water, Sewer & Fire District has made available at the property of such property holder a centralized sewer collection system; and

Will enter a Preliminary, then Permanent Injunction which will affirmatively enjoin the Cleary Water, Sewer & Fire District from threatening to cut off, or actually cut off the water service of any party who fails to pay the sewer charges to property holders who have permitted septic and sanitation systems with the Rankin County Department of Health, and which are not a part of the centralized collection system of the Cleary Water, Sewer & Fire District.

IF YOUR PETITIONERS HAVE prayed for inadequate or insufficient relief, then your Petitioners pray for general relief.

IN DUTY BOUND, your Petitioners ever pray.

/s/ David Ringer
DAVID RINGER, ATTORNEY
FOR PLAINTIFFS

INTERROGATORIES

COME NOW, Plaintiffs, by and through their attorney, and propound the following Interrogatories to the Defendant, Cleary Water, Sewer & Fire District, to be answered under oath, on the first business day of forty-five (45) days after service of Complaint, pursuant to *Mississippi Rules of Civil Procedure*, to-wit:

NOTE A: When used in these Interrogatories the term "Defendant" or any synonym thereof, is intended to and shall embrace and include, in addition to said Defendant, all agents, servants, representatives, private investigators, and others, who are in a position or may have obtained information for or on behalf of the Defendant.

NOTE B: Pursuant to *Mississippi Rules of Civil Procedure* these Interrogatories shall be deemed continuing so as to require supplemental answers if you, your attorneys, or other representative, obtain further information. If additional information is acquired, you are under a duty to supplement said answers.

DEFINITIONS

The following definitions apply throughout the present set of Interrogatories and shall be adopted by Defendant and responded thereto.

- A. "Complaint" refers to the Complaint filed by Plaintiff in the present action and any amendment thereto.

- B. "Answer" shall mean the Answer of the answering Defendant in the present action and any amendment thereto.
- C. "Person" shall mean any natural person or entity, whether business entity, corporation, association, firm partnership or otherwise, governmental entity, other legal entity or any agency, bureau, committee, department, division, subdivision or subsidiary thereof.
- D. "Representative" shall mean any officer, director, agent, employee, attorney, servant or other person acting for or on behalf of the person referred to in the Interrogatory or definition or of the person's affiliate.
- E. "Document" shall mean the original (or copy if the original is not available) and each non-identical copy (whether nonidentical because of alternations, attachments, blanks, comments, notes, underlining or otherwise) or any writing or record, however, described, whether account, agreement, amendment, article, authorization, bank advance or similar notice for transfer, bank statement, bill of lading, blueprint, book, chart, check, contract, correspondence, deposit slip, diary, drawing, entry, estimate or cost to complete estimate, film, tape, financial statement, graph, instruction, internal document, invoice, journal, ledger or subsidiary ledger, letter, memorandum, minutes, notes work papers, studies, notebook, plan, photocopy, photograph, projection, publication, purchase order, recording report, schedule scrapbook, sketch, specification, speech, tape, telegram, telex, transcript, voucher or otherwise, and all retrievable data (whether incarded, taped or

coded electronically, electromagnetically or otherwise) in the possession, custody or control of Defendant, or known to Defendant wherever the document is located, however produced or reproduced, whether draft or final version.

- F. "Communication" or "statement" means any transfer of information by oral statement, document, device or otherwise.
- G. "You" or "yours" means the Defendant and any applicable representatives, directors, officers, employees, engineers or servants, regardless of whether such individuals are representatives, etc. of you.
- H. "Relating" to includes, but without limitation, mentioning, discussing, commenting on, referring to, pertaining to, alluding to, relevant to, or in any way touching upon, or connecting with.
- I. "Identify" when used in reference to:
 - 1. a natural person, shall mean to state the person's full name, present or last known address and telephone number;
 - 2. a business or governmental entity, not a natural person, shall mean to state the entity's full name, principal activities and type of entity (agency, association, corporation, partnership, department, division, etc.)
 - 3. a document, shall mean to state the document's description, title, date, subject matter, author, and the name and address of the person who has custody of such document.

INTERROGATORIES

INTERROGATORY NO. 1: Please explain under what authority you enacted the ordinance which is attached to the Complaint as Exhibit "A".

INTERROGATORY NO. 2: Do you contend that you have the authority to impose those penalties set out in Article XII of the Ordinance which is attached to the Complaint as Exhibit "A"? Explain.

INTERROGATORY NO. 3: For each expert witness which you plan to call at the trial of this matter, please state the following:

- a. Name, address, and qualifications;
- b. Subject matter on which the witness will testify;
- c. Substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion expected to be expressed; and
- d. Provide a *curriculum vitae*.

INTERROGATORY NO. 4: Please identify all documents which you may introduce into evidence at the trial of this matter.

INTERROGATORY NO. 5: Please identify all documents that were not attached to your Complaint that you contend to relate to the allegations of the Complaint.

INTERROGATORY NO. 6: Please identify all witnesses you may have testify at the trial of this matter.

INTERROGATORY NO. 7: State the name and address of any potential party to this lawsuit who is not already a party hereto.

INTERROGATORY NO. 8: If you contend that Plaintiffs have made any admissions, as defined by *Mississippi Rule of Evidence* 801(d)(2), please list each such admission, the date each such admission was made, and the name, address, and telephone number of any persons who witnessed each such respective admission.

INTERROGATORY NO. 9: For any Request for Admission that you deny, set out the factual basis thereof.

INTERROGATORY NO. 10: For any Request for Admission that you deny, set out the legal basis thereof.

INTERROGATORY NO. 11: If you contend that you have been appointed as a board member of the Cleary Water, Sewer & Fire District, set out when you were appointed, by whom you were appointed, for how long a term you were appointed; and identify the minutes in which you were appointed, and if there is any bond posted with regard to your service, identify the amount of the bond and the provisions of the bond.

INTERROGATORY NO. 12: If you have a protocol of that which is expected to be in the easements your letters, set out, including;

- a) The level survey required (e.g. "D" survey, B" survey under Mississippi survey requirements);
- b) Whether lines are to be included, or just plant/tank/system location;
- c) Required reference points;

- d) Time in which to get it rendered;
- e) Authority by which a property owner is required to affirmatively grant an easement across property;
- f) Compensation to be paid for same;
- g) Time at which the protocol was established.

INTERROGATORY NO. 13: If you are aware of any other entity in the State of Mississippi which has attempted to take substantively the same actions as are set out in the Complaint, identify that entity.

INTERROGATORY NO. 14: For the past five (5) years, if you have received complaints of non-compliant sewer discharge or sewer/septic/sanitation system for what any portion of your certified area, which portion is not serviced by a centralized collection system of yours, set out that which you did about it, when you did it and at what costs.

Respectfully submitted,

/s/ DAVID RINGER
DAVID RINGER,
ATTORNEY FOR PLAINTIFFS

REQUESTS FOR ADMISSIONS

COME NOW, Plaintiffs, by and through their attorney of record, and make the Requests for Admissions as hereinafter set out, pursuant to and in accordance with Rules 36, and 37, of the *Mississippi Rules of Civil Procedure*, viz:

1. In the absence of a court judgment to the contrary the admitting party shall have thirty (30) days after service of these Requests in which to admit or deny the Requests below.
2. If no response is made by the admitting party as is above set out, the matter is admitted.
3. If an objection is made, the reasons therefor shall be stated.
4. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party truthfully cannot admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to Rule 37 *MRCP*, deny the matter or set forth reasons why he cannot admit or deny it.
5. If a party fails to admit the genuineness of any document or the truth of any matter as

requested under Rule 36 *MRCP* and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making the proof, including reasonable attorney's fees.

REQUESTS FOR ADMISSIONS

REQUEST NO. 1: Admit that you did not have the power to enact the Ordinance which is attached to the Complaint as Exhibit "A".

REQUEST NO. 2: Admit that the Plaintiffs are entitled to the relief sought in the Complaint.

REQUEST NO. 3: Admit that you were acting outside of your statutory authority when you enacted the Ordinance which is attached to the Complaint as Exhibit "A".

REQUEST NO. 4: Admit that you threatened to cut off water to those who did not comply with the Ordinance which is attached to the Complaint as Exhibit "A".

REQUEST NO. 5: Admit that the actions described in Request No. 4 were improper.

REQUEST NO. 6: Admit that attached is a true and correct copy of Rankin County Board of Supervisors Book 047, Page 567.

REQUEST NO. 7: Admit that the Cleary Water, Sewer and Fire District was not created by the Rankin

County Board of Supervisors until on or about November 5, 1979.

REQUEST NO. 8: Admit that the Ordinance which is attached to the Complaint as Exhibit "A" is unconstitutional.

REQUEST NO. 9: Admit that your actions in enacting the Ordinance which is attached to the Complaint as Exhibit "A" were outside the scope of the powers set out in the creation of the water and sewer district.

Respectfully submitted,

/s/ DAVID RINGER
DAVID RINGER,
ATTORNEY FOR PLAINTIFFS

REQUESTS FOR PRODUCTION

COME NOW, Plaintiffs, by and through their attorney, and request that the Defendant, CLEARY WATER, SEWER & FIRE DISTRICT, produce the originals of the following documents for the purpose of allowing Defendants to inspect and copy same at the law offices of David Ringer, attorney for Plaintiffs, whose street address is 125 East Main Street, Florence, MS, at 2:00 a.m. on the 30th day of September, 2002, pursuant to *Mississippi Rules of Civil Procedure*, to-wit:

REQUEST NO. 1: Produce all documents used to assist in answering the Interrogatories.

REQUEST NO. 2: Produce all documents that you intend to introduce at trial.

REQUEST NO. 3: Produce all documents relating to the creation of the Cleary Water, Sewer and Fire District.

REQUEST NO. 4: Produce all documents relating to the authority under which you enacted the Ordinance which is attached to the Complaint as Exhibit "A".

REQUEST NO. 5: Produce all documents which, in any way, tend to refute the claims of the Plaintiffs.

REQUEST NO. 6: Produce all minutes referenced in Interrogatories or Answers thereto.

REQUEST NO. 7: Produce all bonds referenced in Interrogatories or Answers thereto.

REQUEST NO. 8: Produce all Engineering or state or federal reports, guideline or regulations which you regard as relating to the purposes for which the actions were taken as are set out in the Complaint as actions of the Board.

Respectfully submitted,

/s/ DAVID RINGER
DAVID RINGER,
ATTORNEY FOR PLAINTIFFS

RINGER & BROOME, PLLC
DAVID RINGER, MSB # 5364
POST OFFICE BOX 737
125 E. MAIN STREET
FLORENCE, MS 39073
(601) 845-7349/FAX/(601) 845-6799

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EXHIBIT "A"
**DECENTRALIZED WASTEWATER
USE ORDINANCE**
**CLEARY WATER, SEWER & FIRE
DISTRICT**
RANKIN COUNTY, MISSISSIPPI

AN ORDINANCE REGULATING THE USE OF PUBLIC AND PRIVATE SANITARY SEWER AND DRAINS, PRIVATE SEWAGE DISPOSAL. THE INSTALLATION AND CONNECTION OF BUILDING SEWERS, INSTALLATION, REPAIRS AND IMPROVEMENTS OF SEWER SYSTEMS NOT CONNECTED TO THE CENTRALIZED WASTEWATER TREATMENT SYSTEM, THE DISCHARGE OF WATERS AND WASTES INTO THE ENVIRONMENT AND THE PROVIDING PENALTIES FOR VIOLATION THEREOF, IN THE CLEARY WATER, SEWER & FIRE DISTRICT, RANKIN COUNTY, MISSISSIPPI.

BE IT ORDAINED by the Board of Commissioners of the Cleary Water, Sewer & Fire District, Rankin County, Mississippi as follows:

ARTICLE I

PURPOSE OF ORDINANCE:
DECLARATION OF POLICY

Section 1. Whereas the pollution of the waters of the District constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, it is hereby declared to be the policy of the District and the purpose of the

ordinances to conserve the waters of the District and to protect, maintain and improve the quality thereof for the District's water supply, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other state and local agencies and the federal agencies in carrying out these objectives.

ARTICLE II

DEFINITIONS

Unless the context specifically indicates otherwise, the meaning of terms used in this ordinance shall be as follows:

- Section 1. *"Alternative System" means any approved ground absorption sewage treatment and disposal system other than an approved privy or an approved septic tank and conventional subsurface disposal system.*
- Section 2. *"Approved" means that which has been considered acceptable to the District.*
- Section 3. *"Board" means the Commissioners of Cleary Water, Sewer & Fire District.*
- Section 4. *"Collection sewer" means gravity flow pipelines, force mains, effluent supply lines, and appliances appurtenant thereto, used for conducting wastes from building drains to a treatment system or to a ground absorption sewage treatment and disposal system.*

Section 5. *"Construction Authorization" means the permission to install or repair a sewer system issued by the agent of Cleary Water, Sewer & Fire District.*

Section 6. *"Construction Application" means the initial application for installation of an individual onsite sewage system within the Cleary Water, Sewer & Fire District issued by the District authorizing the Mississippi Department of Health to make a site evaluation and define the type(s) of wastewater treatment system(s), conforming to this ordinance, that can be installed on a lot or property. It is required before the District will issue "Construction Authorization" for the installation or repair of sewer system.*

Section 7. *"Design unit" means one or more dwelling units, places of business, or places of public assembly on:*

(a) a single lot or tract of land

(b) multiple lots or tracts of land served by a common ground absorption sewage treatment and disposal system; or

(c) a single lot or tract of land or multiple lots or tracts of land where the dwelling units, places of business or places of public assembly are under multiple ownership (e.g. condominiums) and are served by a ground absorption system or multiple ground absorption systems which are under common or joint ownership or control.

Section 8. *"District" means the area recognized by law to be Cleary Water, Sewer & Fire District and/or the legal entity.*

- Section 9. *"Generator" means any person whose act or process produces sewage or other liquid waste suitable for disposal in an individual on-site wastewater disposal system or any other process other than through a centralized wastewater system.*
- Section 10. *"Improvement Application" means the initial application for repair or replacement of an individual onsite sewage system within the Cleary Water, Sewer & Fire District issued by the District authorizing the Mississippi State Department of Health to make a site evaluation and recommendations for the repair, improvement or replacement of an existing sewer system conforming to this ordinance. It is required before the District issues a "Construction Authorization" to make the repairs or improvements.*
- Section 11. *"Individual on-site wastewater disposal system" means an approved method of sewage disposal designed and installed in accordance with this ordinance and regulations of the Mississippi State Board of Health and Department of Environmental Quality.*
- Section 12. *"Non-ground absorption sewage treatment system" means a facility for waste treatment designed not to discharge to the soil, land surface, or surface waters, including but not limited to, approved vault privies, incinerating toilets, mechanical toilets, composting toilets, chemical toilets and recycling systems.*
- Section 13. *"Person" means any individual, trust, firm, joint-stock company, public or private*

corporation (including a government corporation), partnership, association, state or any agency or institution thereof, municipality, commission, political subdivision of the state or any interstate body, and includes any officer or governing or managing body of any municipality, political subdivision, or the United States or any officer or employee thereof.

Section 14. *"Place of business" means any store, warehouse, manufacturing establishment, place of amusement or recreation, service station, food handling establishment, or any other place where people work or are served.*

Section 15. *"Place of public assembly" means any fair-ground, auditorium, stadium, church, campground, theater, school, or any other place where people gather or congregate.*

Section 16. *"Professional engineer" means any person who has met the qualifications required under Section 73-12-23(1) and who has been issued a certificate of registration as a professional engineer.*

Section 17. *"Property of the generator" means land owned by or under permanent legal easement or lease to the generator.*

Section 18. *"Relocation" means the displacement of a residence, place of business, or place of public assembly from one location to another.*

Section 19. *"Repair area" means an area, either in its natural state or which is capable of being modified, consistent with these ordinances, which is reserved for the installation of*

additional disposal fields and is not covered with structures or impervious materials.

Section 20. *"Residence" means any home, hotel, motel, summer camp, labor camp, mobile home, dwelling unit in a multiple-family structure, or any other place where people reside.*

Section 21. *"Sanitary system of sewage treatment and disposal" means a complete system of sewage collection, treatment and disposal, including approved privies, septic tank systems, connection to public or community sewage systems, incinerator, mechanical toilets, composting toilets, recycling toilets, mechanical aeration systems, or other such systems.*

Section 22. *"Septic tank" means a water-tight, covered receptacle designed for primary treatment of sewage and constructed to:*

(a) receive the discharge of sewage from a building.

(b) separate settleable and floating solids from the liquid;

(c) digest organic matter by anaerobic material action;

(d) store digested solids through a period of detention; and

(e) allow clarified liquids to discharge for additional treatment and final disposal.

Section 23. *"Septic tank system" means a subsurface sanitary sewage system consisting of a septic tank and a subsurface disposal field.*

Section 24. *"Sewage" means the liquid and solid human waste and other liquid waste generated by water-using fixtures and appliances, including those associated with food handling. The term does not include industrial process wastewater or sewage that is combined with industrial process wastewater.*

Section 25. *"Site" means the area in which the sewage treatment and disposal system is to be located and the area required to accommodate repairs and replacement of the system.*

Section 26. *"Soil" means the naturally occurring body of porous mineral and organic materials on the land surface. Soil is composed of sand, silt, and clay sized particles that are mixed with varying amounts of larger fragments and some organic material. Soil contains less than 50 percent of its volume as rock, saprolite, or coarse-earth fraction (mineral particles greater than 2.0 millimeters). The upper limit of the soil is the land surface, and its lower limit is, "rock", "saprolite", or other parent materials.*

(a) "Sand" means soil material that contains 85 percent or more of sand; the percentage of silt plus 1.5 times the percentage of clay shall not exceed 15.

(b) "Clay" means soil material that contains 40 percent or more clay, less than 45 percent sand, and less than 40 percent silt.

Section 27. *"Stream" means a natural or manmade channel, including groundwater lowering ditches and devices, in which water flows or stands most of the year.*

- Section 28. *"Subdivision" means any land that is divided into ten (10) or more lots, tracts, sites or parcels for the purpose of residential development.*
- Section 29. *"Subsurface disposal" means the application of sewage effluent beneath the surface of the ground by distribution through approved nitrification lines.*

ARTICLE III

POWERS & DUTIES

- Section 1. It shall be the duty of the Board to control pollution in the waters of the District, and it shall specifically have the following powers:
- (a) To study and investigate all problems concerned with the improvement and conservation of the waters of the District.
 - (b) To conduct in cooperation with the Mississippi State Department of Health and Mississippi Department of Environmental Quality studies, investigation and research and to prepare a program which shall pertain to the purity and conservation of the waters of the District and to the treatment and disposal of pollutants or other wastes, with the intended results to be the reduction of pollution of the waters of the District according to the conditions and particular circumstances existing to the District.
 - (c) To propose remedial measures insofar as practical means are available for abatement of such pollution.

Section 2. It shall be the duty of the Board to conduct surveys with respect to the pollution of any waters in the District and to establish criteria standards and limitations for recognized limits of pollution with the assistance of Mississippi State Department of Health and Mississippi Department of Environmental Quality and to establish needed ordinances to control such standards and limitations. The Board and other duly authorized employees of the District bearing proper credentials and identification shall be permitted to enter all properties for the purposes of inspection, observation, measurement, sampling and testing in accordance with the provisions of this ordinance. The Board or its representatives shall have no authority to inquire into any processes including metallurgical, chemical, oil, refining, ceramic, paper or other industries beyond that point having a direct bearing on the kind and source of discharge to the sewers or waterways or facilities for waste treatment.

Section 3. While performing the necessary work on private property the Board or duly authorized employees of the District shall observe all safety rules applicable to the premises. The individual property owner shall be held harmless for injury or death to the District employees and the District shall indemnify the property owner against loss or damage to its property by District employees and against liability claims and demands for personal injury or property damage asserted against the property owner and growing out of the gauging and sampling operations,

except as such may be caused by negligence or failure of the property owner to maintain safe conditions.

Section 4. The Board and other duly authorized employees of the District bearing proper credentials and identification shall be permitted to enter all private properties through which the District holds a duly negotiated easement for the purpose of, but not limited to, inspection, observation, measurement, sampling, repair, and maintenance of any portion of the sewage works lying within said easement. All entry and subsequent work, if any, on said easement, shall be done in full accordance with the terms of the duly negotiated easement pertaining to the private property involved.

Section 5. To exercise supervision over the design, construction, operation and maintenance of individual on-site wastewater disposal systems with flows substantial, equivalent to a single family residential generator. To establish a list of accepted units that will be allowed to be installed in the District, whether these units are to be clustered or stepped, or be single units. The Board, Mississippi State Department of Health and Mississippi Department of Environmental Quality shall enter into a memorandum of understanding, which at a minimum shall clearly define the jurisdiction of each governing body with regard to wastewater disposal and procedures of interdepartmental interaction and cooperation.

Section 6. To adopt, modify, repeal and promulgate rules, regulation and ordinances, after due

notice and hearing, and where not otherwise prohibited by federal or state law, to make exceptions to, to grant exemptions from and to enforce rules, regulation or ordinances implementing or effectuating the duties of the Board under this Ordinance to protect the public health of the District. The Board may grant variances from the rules, regulations or ordinances adopted under these ordinances where the granting of a variance shall not: subject the public to unreasonable health risks or jeopardize environmental resources; or be less restrictive than those rules or regulations established by Mississippi State Board of Health or Mississippi Department of Environmental Quality.

- Section 7. To require the submission of information deemed necessary by the Board to determine the suitability of individual lots for individual on-site wastewater disposal or cluster systems.

ARTICLE IV RESPONSIBILITIES

- Section 1. The permitting of wastewater systems shall be the sole authority and responsibility of the District as complied by these ordinances.
- Section 2. The inspection of the proposed site to determine the suitability of an individual onsite wastewater disposal system shall be the sole authority of the Mississippi Department of Health and its authorized agent. The Mississippi State Department of Health will provide the property owner a list of approved systems that can be supported

by the proposed site. This list of approved systems will be on forms provided by the Board.

Section 3. Prior to the completion of an Improvement or Construction Application for an engineered onsite system, plans and specifications shall be required by the Mississippi Department of Health. These plans and specifications shall be required to be prepared by a registered professional engineer under his/her seal.

Section 4. Any wastewater system which meets one or more of the following conditions shall be designed by a registered professional engineer.

(a) The system is designed to handle over 1,000 gallons per day.

(b) The system requires pretreatment before disposal, other than by a conventional septic or other pretreatment system approved by the Mississippi Department of Health.

(c) The system requires use of a sewage pump(s) prior to the septic tank or other pretreatment system, or which consist of grinder pumps and associated pump basins that are approved by the Board.

(d) The individual system is required to use more than one pump or siphon in a single pump tank.

(e) The system includes a collection sewer, prior to the septic tank or other pretreatment system which serves two or more buildings.

(f) The system includes structures which have not been pre-engineered.

(g) the system is designed for the collection, treatment and disposal of industrial process wastewater.

(h) Any other system serving a business or multi-family dwelling so specified by the Mississippi Department of Health.

(i) The Mississippi Department of Environmental Quality shall review and approve plans and specifications for any industrial process wastewater system.

Section 5.

Plans and specifications required to be prepared by a registered professional engineer shall contain the information necessary for construction of the system in accordance with applicable rules, laws and ordinances and shall include any of the following, determined to be applicable by the Mississippi Department of Health or the Mississippi Department of Environmental Quality:

(a) the seal, signature, and the date on all plans and the first sheet of specifications; specifications and reports prepared by the design engineer and licensed or registered professional who contributed to the plans, specifications, or reports;

(b) a description of the facilities served and the calculations and basis for the design flow proposed;

(c) a site plan based on a surveyed plat showing all system components, public water supply sources within 500 feet, private water supplies and surface water supplies

within 200 feet, water lines serving the project and within 10 feet of all components, building foundations, basements, property lines, embankments or cuts of two feet or more in vertical height, swimming pools, storm sewers, interceptor drains, surface drainage ditch, and adjacent nitrification fields;

(d) specifications describing all materials to be used, methods of construction, means for assuring the quality and integrity of the finished product, and operation and maintenance procedures addressing requirements for the system operator, inspection schedules, residuals management provisions, process and performance monitoring schedules, and provisions for maintaining mechanical components and nitrification field vegetative cover;

(e) plan and profile drawings for collection sewers, force mains and supply lines, showing pipe diameter, depth of cover, clean out and manhole locations, invert and ground surface elevations, vales [sic] and other appurtenances, lateral connections, proximity to utilities and pertinent features such as wells, water lines, storm drains, surface waters, structures, roads, and other trafficked areas;

(f) plans for all tanks, showing capacity, invert and ground elevations, access manholes, inlet and outlet details, and plans for built-in-place or nonstate-approved, precast tanks, also showing dimensions, reinforcements details, liquid depth, and other pertinent construction features;

(g) calculations for pump or siphon sizing, pump curves, and plan and profile drawings for lift stations and effluent dosing tanks, showing anti-buoyancy provisions, pump or siphon locations discharge piping, valves, vents, pump controls, pump removal system, electrical connection details, and activation levels for pumps or siphons and high-water alarms;

(h) plan and profile drawings for wastewater treatment plants and other pretreatment systems, including cross section views of all relevant system components, and data and contact list from comparable facilities for any non standard systems;

(i) plans for disposal field(s) and repair area;

(j) disposal field locations with existing and final relative contour lines based on field measurements at intervals not exceeding two feet or spot elevation if disposal field area is essentially flat or of uniform grade; disposal field layout, pipe sizes, length, spacing, connections and clean out details, invert elevations of flow distribution devices and laterals, valves, and appurtenances; trench plan and profile drawings and flow distribution device details; and location and design of associated surface and ground water drainage systems; and

(k) Any other information required by the Mississippi Department of Health or the Mississippi Department of Environmental Quality.

Section 6. The entire individual onsite wastewater sewage system shall be on property owned and/or controlled by the generator.

Section 7. Necessary easements, right of ways, or encroachment agreements, as applicable, shall be granted to the District before issuance of Construction Authorization for the system installation or repair. Terms of the easement, right of way or encroachment agreement shall provide that the easement, right of way or encroachment:

(a) is appurtenant to specifically described property and runs with the land and is not affected by change of ownership or control;

(b) is valid for as long as the wastewater system is required for the facility that it is designed to serve;

(c) describes and specifies the uses being granted and shall include ingress and egress, system installation, operation, maintenance, monitoring, and repairs;

(d) specifies by metes and bounds description or attached plat, the area or site required for the wastewater system and appurtenances including a site for any required system replacement; and

(e) shall be recorded with the register of deeds in Chancery Clerks Office of Rankin County.

ARTICLE V
APPLICATIONS

- Section 1. Any person owning or controlling a residence, place of business, or place of public assembly containing water-using fixtures connected to a water supply source shall discharge all wastewater directly to an approved wastewater system permitted for that specific use by the Board.
- Section 2. An Improvement Application or Construction Application shall be required in accordance with these ordinances and shall be used to determine whether subsequent additions, modifications or change in the type of facility increase wastewater flow or alter wastewater characteristics.
- Section 3. An Improvement Application or Construction Application, shall be submitted to the Cleary Water, Sewer & Fire District for each site prior to the construction, location, or relocation of a residence, place of business, or place of public assembly. Applications for systems required to be designed by a professional engineer and applications for industrial process wastewater systems shall meet the provisions of this Ordinance.
- Section 4. An Improvement Application or Construction Application shall contain at least the following information: owner's name, mailing address, and phone numbers, location of property, plat of property and/or site plan, description of existing and proposed facilities or structures, number of bedrooms, or number of persons served, or other factors required to determine wastewater system

design flow or wastewater characteristics, type of water supply including the location of proposed or existing well(s), and signature of owner or owner's legal representative. The applicant shall identify property lines and fixed reference points in the field. On the application, the applicant shall notify the Board of the following:

- (1) the property contains previously identified jurisdictional wetlands;
- (2) wastewater other than sewage will be generated; or
- (3) the site is subject to approval by other public agencies.

Section 5. To repair a previously permitted system when the repairs will be accomplished on property owned and controlled by the applicant and for which the property lines are readily identifiable in the field, the applicant shall notify the Board of: the locations of the proposed facility, appurtenances, and the site for the system showing setbacks to property line(s) or other fixed reference point(s); and the proposed system type as specified by the owner or owner's legal representative and that meets the conditions set by this Board.

Section 6. An authorized agent of the Cleary Water, Sewer & Fire District shall issue approval of an Improvement Application or Construction Application after the Mississippi State Department of Health has made an inspection of the site and provided a list of systems that can be installed so as to meet the provisions of these ordinances. A site approval

from the Mississippi Department of Health, for which no modifications have been made, shall be valid without expiration for a period of 12 (twelve) months.

Section 7. The Construction Authorization as provided by these ordinances shall be valid for a period equal to the period twelve months. Site modifications required as conditions of an Improvement Application shall be completed prior to the issuance of a Construction Authorization. The Construction Authorization shall be certified by an authorized agent of the District for a wastewater system after complying with conditions of Improvement Application and/or Construction Application.

Section 8. The Construction Authorization shall contain conditions regarding system type, system layout, location and installation requirements as determined by the Board. The property owner shall ensure that the Construction Authorization is obtained and is valid prior to the construction or repair of a system. The property owner shall obtain a Construction Authorization prior to the construction, location or relocation of a residence, place of business, or place of public assembly. If the installation has not been completed during the period of validity of the Construction Authorization, the information submitted in the Construction Application or Construction Authorization is found to have been incorrect, falsified or changed, or the site is altered, the Construction Application or Construction Authorization shall become invalid, and may be suspended or revoked. When a Construction Application and Construction Authorization

has become invalid, expired, suspended or revoked. the installation shall not be commenced or completed until a new Construction Application and Construction Authorization has been obtained.

Section 9. Prior to the issuance of a Construction Authorization for a wastewater system to serve a condominium or other multiple-ownership development where the system will be under common or joint control, a draft agreement (tri-party) among the District, the developer and a proposed non-profit, incorporated owners association shall be submitted to the Department of Environmental Quality for approval. Prior to the issuance of the Construction Authorization for a system requiring a tri-party agreement, the agreement shall be executed among the District, the developer, and a non-profit incorporated owners association and filed with the Rankin County Chancery Clerks Office, local register of deeds.

Section 10. No residence, place of business, or place of public assembly shall be occupied, nor shall any wastewater system be covered or placed into use, until an authorized agent of the District certifies that all requirements of this ordinance have been meet [sic].

Section 11. No person other than the official agents of the District shall engage in the business of constructing, installing or repairing wastewater systems in the District unless authorization in writing has been issued.

Section 12. When an Application is denied, the report shall be provided to the applicant stating

the reasons for denial. If modifications or alternatives are available, information shall be provided to the applicant. The report shall be signed and dated by the authorized agent of the District.

ARTICLE VI

AVAILABLE SPACE

- Section 1. Sites shall have sufficient available space to permit the installation and proper functioning of an individual onsite wastewater treatment and disposal system, based upon the square footage required for the system installed as determined by the Mississippi Department of Health.
- Section 2. Sites shall have sufficient available space for a repair area separate from the area determined in paragraph (1) above. The repair area shall be based upon the area required to accommodate the installation of a replacement system as specified by the Mississippi Department of Health. Prior to Construction Authorization being issued by the District, an original system layout, the repair area and the type of replacement system will be submitted.
- Section 3. The site evaluation shall include consideration of any other applicable factors involving accepted public health principles, such as, but not limited to:
- (a) The proximity of a large-capacity water-supply well, the cone of influence of which would dictate larger separation distance than the minimum

distance as specified by the Mississippi Department of Health.

(b) The potential public health hazard due to possible failures of soil absorption systems when specifically identified, would dictate larger separation distances than the minimums specified by the Mississippi Department of Health.

(c) The potential public health hazard of possible massive failures of soil absorption systems proposed to serve large numbers of residences, as in residential subdivisions or mobile home parks;

(d) For sites serving systems designed to handle over 1,000 gallons per day, which include one or more nitrification fields with a design flow of greater than 1500 gallons per day, the applicant shall submit sufficient site-specific data to predict the height of the water table mound that will develop beneath the field (level sites) and the rate of lateral and vertical flow away from the nitrification trenches (sloping site). The data submitted may include soil borings to depths greater than 48 inches, permeability and hydraulic conductivity measurements, water level readings, and other information determined to be necessary by the Mississippi Department of Environmental Quality. The site shall be considered unsuitable if the data indicate that the groundwater mound which will develop beneath the

site cannot be maintained two feet or more below the bottom of the nitrification trenches or it is determined that effluent is likely to become exposed on the ground surface within, or adjacent to, the nitrification field.

- Section 4. All of the criteria of this Section shall be determined to be suitable, provisionally suitable, or unsuitable, as indicated. If all criteria are classified the same, that classification will prevail. Where there is a variation in classification of the several criteria, the most limiting uncorrectable characteristics shall be used to determine the overall site classification.

ARTICLE VII

LOCATION SEWER SYSTEMS

- Section 1. Every sanitary sewage treatment and disposal system shall be located at least the minimum horizontal distance from the following:
- (a) any private water supply source, including any well or spring 100 feet;
 - (b) any public water supply source 100 feet;
 - (c) any other stream, canal, marsh, or other surface water 50 feet;
 - (d) any other lake or pond 50 feet, from normal pool elevation;
 - (e) any building foundation 5 feet;
 - (f) any basement 15 feet;

- (g) any property line 10 feet;
- (h) top of slope of embankments or cuts of 2 feet or more vertical heights 15 feet;
- (i) any water line 10 feet;
- (j) drainage system: interceptor drains, foundation drains or storm water diversions, up slope 10 feet; side slope 15 feet, and downslope 25 feet; groundwater lowering ditches and devices 25 feet.
- (k) any swimming pool 15 feet;
- (l) any other nitrification field (except repair area) 20 feet.

Section 2. Disposal fields and repair areas shall not be located under paved areas or areas subject to vehicular traffic. If effluent is to be conveyed under areas subject to vehicular traffic, ductile iron or this equivalent pipe shall be used. However, PVC pipe may be used if a minimum of 30 inches of compacted cover is provided over the PVC pipe.

Section 3. Sewer lines may cross water lines if 18 inches clear separation distance is maintained, with the sewer line passing under the water line. When conditions prevent an 18 inch clear separation from being maintained or whenever it is necessary for the water line to cross under the sewer line, the sewer line shall be constructed of ductile iron pipe or its equivalent and the water line shall be constructed of ferrous materials equivalent to water main standards for a distance of at least ten feet on each side of

the point of crossing, with full sections of pipe centered at the point of crossing.

- Section 4. Septic tanks or treatment plants or any other pretreatment system shall not be located in areas subject to frequent flooding.

ARTICLE VIII

SEWAGE FLOW RATES FOR DESIGN UNITS

- Section 1. In determining the volume of sewage from dwelling units, the flow rate shall be 150 gallons per day per bedroom. The minimum volume of sewage from each dwelling unit shall be 150 gallons per day and each additional bedroom above one bedroom shall increase the volume of sewage by 150 gallons per day. In determining the number of bedrooms in a dwelling unit, each bedroom and any other room or addition that can reasonably be expected to function as bedroom shall be considered a bedroom for design purposes. When the occupancy of a dwelling unit exceeds two persons per bedroom, the volume of sewage shall be determined by the maximum occupancy at a rate of 75 gallons per person per day.

ARTICLE IX

SITE EVALUATION

- Section 1. The Mississippi Department of Health shall investigate each proposed site. The investigation shall include the evaluation of the following factors:

- a. Absence of or protection from frequent flooding.
- b. Landscape position with good surface runoff.
- c. Slopes of less than 15%.
- d. Depth to high water table of greater than four feet.
- e. Depth to bedrock, fragipan or plinthite of greater than four feet.
- f. Soil texture and color defined by the Natural Resource Conservation Service as indicating good drainage and suitability for soil absorption, based on a soil boring of five feet.
- g. Available area in which to install an individual onsite wastewater disposal system meeting all requirements of this regulation. The area for repairs and future extensions shall be no less than 50% of the space required for the recommended system. Systems utilizing surface land application discharge are exempt from the 50% additional area requirement.

Section 2. The non compliance of one or more of the above items may (1) require a design alteration of an underground system or (2) prohibit the use of some or all design based individual onsite wastewater disposal system on the site.

Section 3. It should be recognized that some lots, because of size and/or severe soil/site conditions, cannot support an individual onsite

wastewater disposal system. In such cases, **no design based system** shall be recommended by the Health Authority.

- Section 4. Performance based wastewater systems may be approved on lots that, as a result of the soil/site evaluation, have restrictions that preclude the use of a design based onsite wastewater disposal system.

ARTICLE XI

MAINTENANCE OF SEWER SYSTEMS

- Section 1. The District or owners of property upon which an onsite wastewater sewage treatment and disposal system is installed shall be responsible for the following items regarding the maintenance of the system. These items cover all units inside the District whether the District is maintaining them or the property owner is maintaining them:

(1) Onsite wastewater sewage treatment and disposal systems shall be operated and maintained to prevent the following conditions:

(a) a discharge of sewage or untreated effluent to the surface of the ground, the surface waters, or directly into groundwater at any time; or

(b) a back-up of sewage or effluent into the facility, building drains, collection system, or freeboard volume of the tanks.

- Section 2. The system shall be considered to be malfunctioning when it fails to meet one or more of these requirements, either continuously or intermittently, or if it is necessary to remove the contents of the tank(s) at a frequency greater than once per month in order to satisfy the conditions of Part (a) or (b) of this Paragraph. Legal remedies may be pursued after an authorized agent has observed and documented one or more of the malfunctioning conditions and has issued a notice of violation.
- Section 3. Systems which incorporate a septic tank for primary treatment shall be checked, and the contents of the septic tank removed, periodically from all compartments, to ensure proper operation of the system. The contents shall be pumped whenever the solids level is found to be more than $\frac{1}{3}$ of the liquid depth in any compartment. Systems which incorporate an aerobic treatment unit for secondary treatment shall be checked by a factory authorized maintenance provider and the solids pumped as to manufacturers' recommendations.
- Section 4. No Improvement Authorization or Construction Authorization shall be issued for a system not maintained by the District or under contract for maintenance filed properly with the District.
- Section 5. If a unit is maintained by the owner, the owner shall perform all necessary maintenance as provided by these ordinances, or the owner shall contract with a private management entity to perform the necessary maintenance. A copy of the agreement

shall be filed with the District. The contract shall include: the specific requirements for maintenance and operation, responsibilities of the owner and private management entity, provisions specifying that the contract shall be in effect for as long as the system is in use, and any other requirements necessary for the continued proper performance of the system. Any property sold with a system not maintained by the District will have to comply with this ordinance and be approved by the District on a case by case basis.

- Section 6. Inspections of the system shall be performed by the District, the owner or the private management entity at the frequency specified by the District or manufacturer of the system. The inspection report shall be filed with the District. Failure to do so will constitute failure of the system and appropriate actions shall be taken by the District to insure compliance with the ordinances. Any problems discovered by the inspection shall be reported in writing within 48 hours in order to obtain a construction permit for the repairs.
- Section 7. The private management entity or owner of the system shall be responsible for assuring routine maintenance procedures and the monitoring requirements in accordance with the ordinances.
- Section 8. Sewage systems with multiple components shall be classified by their highest or most complex system type as determined the District's agent, with the assistance of the Mississippi Department of Health. Systems not

identified by either parties shall be classified by the Mississippi Department of Environmental Quality.

Section 9.

A sewage collection, treatment and disposal system shall be repaired within 30 days of notification by the District either: when it creates, or has created, a public health hazard or nuisance due to the surfacing of effluent or the discharge of effluent directly into groundwater or surface waters; or when it is partially or totally destroyed. If it is not repaired within 30 days of notification, the District shall enforce the installation of a system approved by the District. All cost incurred by the District in enforcement of this action shall be borne by the property owner of the system. If a system described above has been disconnected or in non use, the property owner shall comply with all ordinances of the District and install a unit approved by the District. If a system becomes unrepairable, then the owner of the property shall install a system approved by the District, and abide by all ordinances of the District. If for any reason the system is abandoned, the property owner shall have any contents removed, collapse any components and backfill, and/or otherwise secure the system as directed by the District's agent. If the owner does not comply with the above requirements, the District will take the appropriate action and all cost in doing so will be paid by the property owner. A lien will be filed as a lien against the property for any outstanding costs not paid by the the [sic] property owner.

- Section 10. When necessary to protect the public health the District shall require the owner of the property of a malfunctioning system to pump and haul sewage to an approved wastewater treatment system during the time needed to repair the system.

ARTICLE XII

PENALTIES

- Section 1. Any person found to be violating any provision of this ordinance shall be served by the District with written notice stating the nature of the violation and providing a reasonable time limit for the satisfactory correction thereof. The offender shall, within the period of time stated in such notice, permanently cease all violations.
- Section 2. Any person who shall continue any violation beyond the time limit provided for in Article XII, Section 1, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in the amount not to exceed \$1,000.00 (one thousand dollars) for each violation. Each day in which any such violation shall continue shall be deemed a separate offense.
- Section 3. Any person violating any of the provisions of this ordinance shall become liable to the District for any expense, loss or damage occasioned the District by reason of such violation.

ARTICLE XIII

USER CHARGES

Section 1. The Board shall levy monthly user charges to each user of the decentralized wastewater system as outlined in this ordinance. These charges shall be based on water consumption through a recordable water meter serving the property.

Section 2. Monthly user charges shall be proportionately distributed among the user's of the decentralized system and shall be established by the Board to generate adequate revenue to provide for the self-sufficient operation and maintenance of the program.

Rates shall be solely established by the Board and reviewed each year on or about November. Changes in rates will be published on the back of monthly water bills.

ARTICLE XIV

VALIDITY

Section 1. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 2. The invalidity of any section, clause, sentence, or provision of this ordinance shall not affect the validity of any other part of this ordinance which can be given effect without such invalid part or parts.

ARTICLE XV

ORDINANCE IN FORCE

Section 1. This ordinance shall be in full force and effect from and after its passage, approval, recording and publication as provided by law.

Section 2. Passed and adopted by the Board of Commissioners of the Cleary Water, Sewer & Fire District, Rankin County, Mississippi, on the ____ day of ____ 2001, by the following vote:

Ayes: _____ Namely _____

Nays: _____ Namely _____

Approved this ____ day of ____ 2001.

Kenneth D. Johnson Chairman

ATTESTED:

Kenneth W. Munn Secretary of Board

EXHIBIT "B"

[LOGO]
MEMBER

[LOGO]

Cleary Water, Sewer & Fire District

217 Hickory Ridge Drive • Florence, MS 39073 • 601-845-6375

September 14, 2001

TO ALL WATER USER CUSTOMERS:

On June 21, 2001, of this year the Cleary Water, Sewer & Fire District, passed and put into effect a new wastewater ordinance for those people not already on the centralized wastewater system. This new ordinance and system is call a decentralized wastewater system.

WHAT IS A DECENTRALIZED WASTEWATER SYSTEM?

Until the mid 90's there were only two types of systems recognized in the USA. One was a centralized wastewater system, such as the City of Richland, Jackson, Florence and Cleary Heights has. The other was onsite wastewater treatment, where an individual has a system for wastewater treatment installed and then the individual maintained the unit. EPA up until this time recognized and promoted centralized system and discouraged onsite, because of the fact once the system was installed it became the property owners problem and like most problems which are "out of sight out of mind" the systems are not maintained properly and fail. What the decentralized system does is combine characteristics of both systems and makes a workable program to maintain the onsite system properly.

WHO IS EFFECTED BY THE NEW ORDINANCES?

Everybody not presently on the centralized system that have onsite wastewater systems. Those are septic tanks and aerobic treatment plants.

HOW ARE THEY EFFECTED?

Every homeowner that had a onsite wastewater treatment process on June 21, 2001, was "**grandfathered**" into the system. That is the property owner will not be required to install a new system as long as it is working properly. Each property owner will be required to have his system inspected within one year of the date of this letter with the results sent to our office. Then each year following the initial inspection the District will require the property owner to present proof that the system is working properly. If the property owner can not [sic] present proof that their system is working properly then the owner will be required to install an approved system designated by the District and will become a sewer customer of the District. The District will accept ownership of the unit and in exchange the District will maintain the unit for the life of the unit. All cost in routine maintenance will be born [sic] by the District. The customer will pay a monthly charge to the District for the service and it will be added to the water bill. If a present water customer of the District would like to transfer ownership of his present system to the District and have the District maintain it for him, the unit will have to meet certain qualification [sic]. These qualifications will be determined on a case by case basis and can be resolved by calling the District Office and making inquires.

The "grandfather" allowance applies only to those customers on June 21, 2001, and does not run with any transfer

of ownership. Any transfers after June 21, 2001, will result in the new customer to meet all requirements of the new ordinances.

WHAT WILL IT COST ME?

The cost of the service will be determined by the Commissioner of the District, at present the cost will be a minimum of \$15.00 a month and any usage over 5,000 gallons of water will cost \$1.62 per thousand gallons.

All cost in maintaining the system will be born [sic] by the District with the exception of "miss use or abuse".

A copy of our "POLICY AND PROCEDURES" is included for your information and I will gladly answer any of your questions on a "one on one" basis if needed. Our phone number is 601-845-6375.

CLEARY WATER, SEWER & FIRE DISTRICT DECENTRALIZED WASTEWATER POLICY & PROCEDURES

PURPOSE The purpose of these policies and procedures is to interpret the manner in which the Cleary Water, Sewer & Fire District Decentralized Wastewater Ordinances shall be applied.

DEFINITIONS

- (1) District - The Cleary Water, Sewer & Fire District
- (2) Department of Health - The Rankin County Health Department

- (3) IOWDS - Individual Onsite Wastewater Disposal System
- (4) Ordinance - The Cleary Water, Sewer & Fire District Decentralized Wastewater Ordinance

GENERAL

All individual onsite wastewater systems that are in use upon passage of the Cleary Water, Sewer & Fire District "Decentralized Wastewater Ordinance" will be "grand fathered" into the system for a period of one year.

ARTICLE I

ON-SITE WASTEWATER UNITS

SECTION 1. All persons with an existing individual on-site wastewater system (IOWDS) will have one year from the date of passage of this ordinance to present to the District certification that the existing onsite wastewater system is functioning properly. This certification can be obtained from the Department of Health, a certified installer, or an authorized manufacturers representative. Certification that the existing system is functioning properly will be required each year from the date of initial certification.

SECTION 2. All new installations of on-site wastewater disposal systems will conform to the Decentralized Wastewater Ordinances as set forth.

ARTICLE II
STEPS OF INSTALLATION
EXISTING UNITS

SECTION 1. Any existing IOWDS that fails to comply with the Decentralized Wastewater Ordinances, must be repaired within sixty (60) days to bring the system up to standards. If the IOWDS for whatever reason cannot be brought up to standards, then the owner will install a new system meeting all requirements as prescribed by the Ordinances, or if installing a new system meeting all requirements of the Regulation is not possible, make repairs as prescribed in Section 5 of this Article. When a new system is installed to replace a failing existing system the District will assume ownership and provide perpetual maintenance of the IOWDS, and the owner will become a customer of the Decentralized Wastewater system.

SECTION 2. If the owner wishes to transfer ownership of any existing IOWDS that complies with the Decentralized Wastewater Ordinances to the District, the owner must present to the District proof from an authorized manufacturers representative, or the Department of Health, that the IOWDS is up to standards in operation. Furthermore the District will pay for the inspection if the IOWDS complies and the District assumes ownership of the system. If for whatever reason the District does not assume ownership of the system, the owner will be billed for the cost of the inspection.

At the time the District assumes ownership of the system then the owner becomes a customer of the Decentralized Wastewater system and the District will perpetually maintain the system. If the District assumes ownership of an IOWDS, the property owner will provide to the District the proper right-of-way and easement to provide egress and access to the IOWDS so as to allow the properly identified District employee to maintain the system. To allow for proper maintenance of the system, nothing shall be built over, or laid over, the IOWDS or any electrical or water conveying portion of the system. Transfer of ownership of an existing IOWDS must take place with one year of the time that the Ordinances go into effect to avoid any future cost for maintenance.

SECTION 3. All existing IOWDS that are under a maintenance agreement with the Manufacturer of the system will not require an annual inspection/certification as long as a copy of the current in-forced agreement is on file at the District's office. All other systems not covered by a maintenance agreement will be required to furnished [sic] an approved inspection report Each year, or be in violation of the Ordinance.

SECTION 4. Any existing system that will require a complete upgrade or change of the system will must meet all provisions of Article III "New Installations".

SECTION 5. Any system that can not be repaired or replaced, to fully approvable standards,

shall be improved with recommendations from the Department of Health so as to treat the wastewater as best as possible, reduce the volume of treated effluent as much as possible, and maintain the treated effluent on the property of the generator to the greatest extent possible.

SECTION 6. All existing individual onsite wastewater disposal systems at the time of property transfer will be required to be certified and ownership of the system will be transferred to the District with the property owner becoming a customer of the Decentralized Wastewater System and the District will perpetually maintain the system.

ARTICLE III

NEW INSTALLATIONS

SECTION 1. All new individual onsite installation shall conform to all requirements of the current Decentralized Wastewater Ordinances and the Regulation Governing Individual Onsite Wastewater Disposal.

SECTION 2. All new installations of IOWDS shall require the property owner or his/her representative to provide the District two platted surveys of the site which will include all above and below ground buildings, electrical lines (buried), water lines, gas lines and aperture. The Platt will be certified by a engineer or land surveyor licensed to do business in Mississippi. The Platt will include dimensions of building(s) and approximate location of all

below ground installations. A copy of the Platt will be attached to the District's soil analysis form that will be presented to the State Board of Health for the inspection of the site. The form will be filled out by the owner or his/her authorized representative to include all appropriate information. A copy of the Platt must be attached to the District's soil/site evaluation form. This form, along with the Plan, will be presented to the Department of Health for the inspection of the site. The Department of Health will inspect the site and give to the owner the completed form which the owner will return to the District. The District's engineer and/or manager will determine the appropriate IOWDS to be installed at the site. Upon Department of Health inspection and final approval of the installed system the District will assume ownership and perpetual maintenance of the system, with the owner becoming a customer of the District. The property owner will provide a right-of-way and easement to the District that will cover all egress and ingress for properly identified employees to maintain the system. To allow for proper maintenance of the system, nothing shall be built over or laid over any electrical or water conveyances to the unit or the system itself so as to obstruct maintenance of the system.

SECTION 3. Onsite systems incorporating a septic tank as part of the installation shall be equipped with risers at or near the surface at the inlet and outlet of the tank to facilitate inspection and pumping without

removal of the top of the tank. In addition all septic tanks will incorporate an in-tank effluent filter. Outlet man way and riser shall be sized large enough to facilitate the removal of the filter for routine inspection and/or maintenance.

- SECTION 4.** All septic tanks, pump chambers, chlorine contact chambers and distribution boxes shall be constructed and properly sealed so as to prevent infiltration and exfiltration of liquid.

ARTICLE IV

COST AND FEES

- SECTION 1.** All cost incurred by the District including the final inspection of the IOWDS will be borne by the owner. After final inspection and acceptance by the District, the District will assume all cost of maintenance of the IOWDS. Final payment for the system purchased by the District will be due and payable upon final inspection by the Department of Health.
- SECTION 2.** If the District assumes ownership of a previously installed IOWDS, all cost incurred for its inspection, will be borne by the District. If the District does not assume ownership of the IOWDS then the owner will bear the cost of the inspection. The owner will bear/pay all cost incurred to bring a previously installed IOWDS up to the applicable standard necessary for the District to assume ownership.

SECTION 3. All monthly fees and charges will be set by the District's Board of Commissioners and will be reviewed annually at the November public meeting. Monthly fees will [be] based upon water consumption through the household's potable water meter.

EXHIBIT "C"

**CLEARY WATER, SEWER & FIRE DISTRICT
217 HICKORY RIDGE DRIVE
FLORENCE, MISSISSIPPI 39073
601-845-6375**

March 20, 2002

TO ALL WATER USE CUSTOMERS:

On September 14, 2001, the District sent each customer who was not on the Centralized Wastewater System a letter of instructions that outlined the new **Decentralized Wastewater System**. This system is governed by a set of ordinances that have been duly enacted and went into effect on June 21, 2001.

This is your **second** notice that you will be required to comply with these ordinances and that you have until September 14, 2002 to comply. After that date you will be subject to fines and penalties as proscribed in the ordinances.

For clarification, if you are on the Cleary Water, Sewer & Fire District water system and pay the District for water service then you must comply to this ordinance. Cleary Water, Sewer & Fire District is certificated by the Public

Service Commission for sewer service in every area that we serve water.

A copy of the original letter of September 14, 2001, is included for your review.

CLEARY WATER, SEWER & FIRE DISTRICT

Kenneth D. Johnson
Chairman

September 14, 2001

TO ALL WATER USER CUSTOMERS:

On June 21, 2001, of this year the Cleary Water, Sewer & Fire District, passed and put into effect a new wastewater ordinance for those people not already on the centralized wastewater system. This new ordinance and system is called a decentralized wastewater system.

WHAT IS A DECENTRALIZED WASTEWATER SYSTEM?

Until the mid 90's there were only two types of systems recognized in the USA. One was a centralized wastewater system, such as the City of Richland, Jackson, Florence and Cleary Heights has. The other was onsite wastewater treatment, where an individual has a system for wastewater treatment installed and then the individual maintained the unit. EPA up until this time recognized and promoted centralized system and discouraged onsite, because of the fact once the system was installed it became the property owners problem and like most problems which are "out of sight out of mind" the systems are not maintained properly and fail. What the decentralized

system does is combine characteristics of both systems and makes a workable program to maintain the onsite system properly.

WHO IS EFFECTED BY THE NEW ORDINANCES?

Everybody not presently on the centralized system that have onsite wastewater systems. Those are septic tanks and aerobic treatment plants.

HOW ARE THEY EFFECTED?

Every homeowner that had a onsite wastewater treatment process on June 21, 2001, was "**grand fathered**" into the system. That is the property owner will not be required to install a new system as long as it is working properly. Each property owner will be required to have his system inspected within one year of the date of this letter with the results sent to our office. Then each year following the initial inspection the District will require the property owner to present proof that the system is working properly. If the property owner can not [sic] present proof that their system is working properly then the owner will be required to install an approved system designated by the District and will become a sewer customer of the District. The District will accept ownership of the unit and in exchange the District will maintain the unit for the life of the unit. All cost in routine maintenance will be born by the District. The customer will pay a monthly charge to the District for the service and it will be added to the water bill. If a present water customer of the District would like to transfer ownership of his present system to the District and have the District maintain it for him, the unit will have to meet certain qualification. These qualifications will be determined on a case by case basis and can

be resolved by calling the District Office and making inquires.

The "grandfather" allowance applies only to those customers on June 21, 2001, and does not run with any transfer of ownership. Any transfers after June 21, 2001, will result in the new customer to meet all requirements of the new ordinances.

WHAT WILL IT COST ME?

The cost of the service will be determined by the Commissioner of the District, at present the cost will be a minimum of \$15.00 a month and any usage over 5,000 gallons of water will cost \$1.62 per thousand gallons.

All cost in maintaining the system will be born by the District with the exception of "miss use or abuse".

A copy of our "POLICY AND PROCEDURES" is included for your information and I will gladly answer any of your questions on a "one on one" basis if needed. Our phone number is 601-845-6375.

EXHIBIT "D"

**CLEARY WATER, SEWER & FIRE DISTRICT
217 HICKORY RIDGE DRIVE
FLORENCE, MISSISSIPPI 39073
601-845-6375**

June 5, 2002

Dear Customer,

This letter is the third of four notices that we are sending out to remind you that you need to comply with the

new Decentralized Wastewater Ordinance and that you have until September 14, 2002, to comply. If you have already had your system inspected and/or pumped out and you are receiving this letter, please call the office and make sure we have a copy of your compliance on file.

Some customers have asked who can certify that my system is operating properly. The State Board of Health can inspect your system and any certified installer of the system that you own can certify it and we will take a certification from a company in the business to maintain your system type.

For "NORWECO" UNITS, Davidson Digging Service at 664-1177, Mr. Mickey Hedgepeth, can inspect them, for "AQUAKLEAR UNITS", Mr. Grady Tucker at 936-7711, can inspect the units, for "DELTA UNITS", Mr. Guy Berry with Seal Digging Service, at 372-6605, can inspect the units, for "JET UNITS", Mr. Bobby Snell with Snell's Concrete Tanks, at 845-1881, can inspect these units and for "MO-DAD UNITS" Mr. Lacey with Lacey's Digging service at 939-6511 can inspect these units.

We have also accepted certifications from Mike Sims at 892-5488, Ashley's Septic Tank Service at 932-1200, Chip Taylor with Wastewater Control at 845-5581, and Dier's Sanitation at 371-1269.

If you are having problems complying with the ordinances you can contact us and we will try our best to help you solve the problem, but everyone on our water system will have to comply by September 14, 2002. Failure to

C-77

comply will at the minimum cause you water service to be disconnected and we do not take please in cutting water off.

Sincerely yours,

*Kenn Munn
Manager*

IN THE COURT OF APPEALS OF
THE STATE OF MISSISSIPPI

HAROLD GREEN, ET AL., AND
CITY OF RICHLAND, MISSISSIPPI APPELLANTS
v. CAUSE NO. 2003-CA-01062-COA
CLEARY WATER, SEWER APPELLEE
 & FIRE DISTRICT

MOTION FOR REHEARING

COMES NOW, HAROLD GREEN, by and through his attorney, and files this his Motion for Rehearing, and in support thereof would show unto the Court the following, to-wit:

I.

FACTUAL AND PROCEDURAL BACKGROUND

Cleary Water, Sewer and Fire District on June 21, 2001, enacted the Decentralized Wastewater Use Ordinance (the "Ordinance"). The Ordinance provides that homeowners who were not on the centralized water system as of June 21, 2001, are required to have their onsite wastewater system inspected and to annually provide proof that the system is working properly. Those who can not provide such proof would be required to install an approved system designated by the District. All costs associated with the inspection(s) and the replacement of a wastewater system is to be borne by the homeowner. Any replaced system would then be maintained by the District with the customer paying a monthly charge for said maintenance. The District issued letters to its constituents on September 14, 2001, March 20, 2002 and June 5, 2002, declaring that failure to comply with the

Ordinance would result in water service being disconnected.

Harold Green, *et al.*, ("Mr. Green"), commenced this action on August 23, 2002, by filing a Complaint against Cleary Water, Sewer and Fire District. The Complaint sought to enjoin Cleary Water, Sewer and Fire District from enforcing the requirements of the Ordinance. The Complaint sought declaratory action to rule that the Ordinance was unconstitutional, was pre-empted by other state police power, was outside the ambit of powers of the District, and constituted a taking of property without just compensation. The trial court on April 17, 2003, granted the District's Motion for Summary Judgment and enter an Order finding that the Ordinance was "proper and is fully enforceable." Mr. Green perfected a timely appeal.

The Court Of Appeals, on August 3, 2004, handed down its opinion affirming the Order of the trial court. Mr. Green timely filed a Petition for Writ of Certiorari, which was granted by this Court. This Court handed down its opinion on June 23, 2005, reversing the order of the trial court and remanding for further findings. In doing so, this Court held, *inter alia*, that:

... the Cleary District had authority under Miss. Code Ann. §§ 19-5-173 & -175 to enact an ordinance which would protect its water supply and that such action was not preempted by the Mississippi Individual On-Site Waste Water Disposal System Law. However, any provision of such ordinance that conflicts with rules or regulations adopted by State Board of Health, pursuant to its powers under Miss. Code Ann. §§ 41-67-1 *et seq.*, should be declared void and given no effect.

Green v. Cleary Water, Sewer & Fire District, 2005 WL 1498508, No. 2003-CT-01062-SCT (¶18) (Miss. 2005).

II.

DISCUSSION OF AUTHORITIES

A.

Whether this Court Has Overlooked or Misapprehended the Law and Facts in Ruling That the Cleary Water, Sewer & Fire District's Enactment of its Decentralized Wastewater Use Ordinance Was a Valid Exercise of Any Police Power it May Be Granted Where Said Ordinance Falls Outside the Ambit of the Cleary Water, Sewer & Fire District's Statutorily Defined Field.

This Court relies on Miss. Code Ann. § 19-5-175 & 173, in holding that the Cleary Water, Sewer & Fire District's (the "District") adoption of the ordinance was a valid exercise of its general police power. However, any "general police power" granted the District would not give the District power to enact ordinances outside of the field in which it is specifically given statutory grant in which to regulate. See *Clancy's Lawn Care & Landscaping, Inc. v. Mississippi State Board of Contractors*, 707 So. 2d 1080, 1083 (Miss. 1998) (holding that "administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any such power exercised must be found within the four corners of the statute under which the agency operates.") (Citations omitted).

Justice Griffis, aptly set out the correct law in his dissent to the Opinion of the Court of Appeals. Justice Griffis wrote as follows:

I am of the opinion that the majority has incorrectly determined that the Cleary Water, Sewer

& Fire District had the statutory authority to regulate individual on-site wastewater disposal systems and that the Mississippi Individual On-Site Wastewater Disposal Law does not preempt the regulation of individual on-site wastewater disposal systems. Therefore, I respectfully dissent.

In *Lepre v. D'Iberville Water and Sewer Dist.*, 376 So.2d 191, 194 (Miss. 1979), the Mississippi Supreme Court held that a water/sewer district may only exercise such powers as are expressly delegated to it by the legislature.

* * * *

Mississippi Code Annotated Section 19-5-175 (Rev. 2003) expressly limits the District's authority to "sewer systems." Mississippi Code Annotated Section 49-17-5(c) (Rev. 2003) sets forth a definition of a "sewerage system" to mean "pipelines or conduits, pumping stations, and force mains, and other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal." I can find no definition, either statutory or otherwise, that would suggest that a sewer system includes individual on-site wastewater disposal systems or septic tanks.

Clearly, the legislature recognized a difference between sewer systems and septic tanks by enacting the Mississippi Individual On-Site Wastewater Disposal System Law. Miss. Code Ann. §§ 41-67-1 et seq. (Rev. 2001). The Mississippi Individual On-Site Wastewater Disposal System Law provides for a comprehensive statutory scheme for regulating septic tanks. Miss. Code Ann. § 41-67-3(1) (Rev. 2001). The legislature

specifically granted the power to promulgate rules and regulations regarding septic tanks to the Mississippi State Board of Health. Miss. Code Ann. §§ 41-67-3(1)(b) and 41-67-3(4) (Rev. 2001).

The majority rejects the statutory limitations on the District's powers, as established in Mississippi Code Annotated Section 19-5-175 (Rev. 2003), and bases its decision on the general police powers of Mississippi Code Annotated Section 19-5-173 (Rev. 2003). Section 19-5-173 grants regulatory power to the District to: (1) make regulations to secure the general health of residents in a district; (2) prevent, remove and abate nuisances; (3) regulate or prohibit construction of privy-vaults and cesspools; (4) regulate or suppress privy-vaults or cesspools already constructed; and (5) compel and regulate the connection of all property with sewers. The District's ordinance does not relate to any type of nuisance and it does not attempt to connect all property with sewers. Privy-vaults and cesspools refer to outhouses and other structures that retain sewage but provide little or no treatment before releasing the sewage to the surrounding area. Thus, the majority determines that the ordinance was enacted to secure the general health of residents.

The Mississippi Individual On-Site Wastewater Disposal System Law ensures that individual on-site wastewater disposal systems (septic tanks) are properly designed, constructed, operated and maintained. Miss. Code Ann. § 41-67-3(1)(a) (Rev. 2003). The legislature granted the State Board of Health with primary responsibility over septic tanks and specifically authorized the Mississippi Department of Environmental Quality to assist

in the administration of the State Board of Health's responsibilities and clearly defined each department's role and responsibilities in overseeing the use of septic tanks. *Id.* Thus, by statutory enactment, the State Board of Health and the Mississippi Department of Environmental Quality have the responsibility to ensure that septic tanks do not adversely affect the general health of residents. *Id.*

In Mississippi Code Annotated Section 41-67-15 (Rev. 2003), the legislature determined that "nothing in this chapter [the Mississippi Individual On-Site Wastewater Disposal System Law] shall limit the authority of a municipality or board of supervisors to adopt similar ordinances which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern." The District is neither a municipality nor a board of supervisors. Accordingly, the Mississippi Individual On-Site Wastewater Disposal System Law preempts the regulation of individual on-site wastewater disposal systems, or septic tanks, by the District. As such, the District had no authority to promulgate rules and regulations regarding septic tanks.

In conclusion, the individual appellants are not served by the District's centralized sewer system. As a result, they are required to install an individual septic tank pursuant to the rules and regulations of the State Board of Health. If the District were to install a centralized sewer system to everyone within its boundaries, then the District would have the statutory authority to require that every resident be connected to the District's system. Through the enactment of this ordinance, I find that the District has acted

beyond its jurisdictional bounds and has no authority to regulate individual on-site wastewater disposal systems, and the chancellor erred as a matter of law in granting the summary judgment in favor of the District.

Green v. Cleary Water, Sewer & Fire District, 2004 WL 1729482, No. 2003-CA-01062-COA (¶24 & 26-31) (Miss. App. 2004) (Joined by Justice Lee).

In support of its Opinion, this Court holds that Miss. Code Ann. § 41-67-1 *et seq.*, does not expressly prohibit the District from regulating individual on-site wastewater systems. This holding, however, overlooks the fact that it matters not that the Mississippi Individual On-Site Wastewater Disposal System Law does not expressly prohibit such districts from regulating in the field. The District cannot act except as granted power to act by express Legislative provision. Which in the case at bar, the Legislature has made no express grant to the District to regulate individual on-site wastewater disposal systems. See *Clancy's Lawn Care & Landscaping, Inc. v. Mississippi State Board of Contractors*, 707 So. 2d 1080, 1083 (Miss. 1998). See also Miss. Code Ann. § 19-5-1, *et seq.*

The Supreme Court has consistently held that administrative bodies have only such powers as are expressly granted them within the "four corners" of the statute under which the political body operates. *Strong v. Bostick*, 420 So.2d 1356, 1361 (Miss. 1982). It is likewise well settled that an administrative body, such as the District, "has no inherent powers." *Mississippi Public Service Comm. v. Mississippi Power & Light Co.*, 593 So.2d 997, 1004 (Miss.1991). Moreover, the political body may not make and adopt rules "under the guise of 'implied power'

which exceed or conflict with the authority granted it by statute." *Id.*

Miss. Code Ann. § 19-5-175, recognizes the boundaries of the Districts powers by stating that such districts "shall be vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created." (Emphasis added). This Court cites this portion of Miss. Code Ann. § 19-5-175, in support [of] its holding that Cleary has the authority to enact the ordinance, implicitly because it was necessary to accomplish the act which Cleary sought to undertake – the regulation of individual on-site wastewater disposal systems. However, the threshold issue must be whether the act which the District seeks to accomplish is within the purpose for which it was created.

In order to determine the Districts's ambit in which to exercise any "general police power" we must read all of the relevant statutes in conjunction. The primary rule of statutory construction is to determine legislative intent from the statute as a whole. *Bailey v. Al-Mefty*, 807 So. 2d 1203, 1206 (Miss. 2001). Legislative intent "must be determined by the total language of the statute and not from a segment considered apart from the remainder." *Manufab, Inc. v. Mississippi State Tax Com'n*, 808 So. 2d 947, 949 (Miss. 2002) (quoting *Brady v. John Hancock Mut. Life Ins. Co.*, 342 So. 2d 295, 298 (Miss. 1977)).

As such, the District's grant of police power by Miss. Code Ann. § 19-5-173, must be read in conjunction with Miss. Code Ann. § 19-5-175, which demarcates the outer limits of the District's grant of power. Miss. Code Ann. § 19-5-175, provides that the powers of such water, sewer and fire districts:

shall be limited to the conducting and operating of a water supply system, a sewer system, a garbage and waste collection and disposal system, a fire protection system, a combined water and fire protection system, a combined water and sewer system, a combined water and garbage and waste collection and disposal system, or a combined water, sewer, garbage and waste collection and disposal and fire protection system;

Nowhere in the statutes' list of areas in which the District is authorized to act is there recited the power to regulate individual on-site wastewater disposal systems. As noted by Justice Griffis, *supra*, the individuals whose wastewater disposal systems Cleary seeks to regulate, are not served by Cleary's centralized sewer system, its statutorily granted purpose. Cleary seeks to regulate in an area granted to another agency instead of expanding its centralized sewer system to provide services to these individuals.

Cleary is also prohibited from regulating individual on-site wastewater disposal systems because the legislature has expressly granted such power to the State Board of Health. See Miss. Code Ann. §§ 41-67-1, *et seq.* Where power to regulate has been delegated by statute to another agency or governmental unit, the District would have no authority to act. See *Watkins v. Navarette*, 227 So.2d 853 (Miss. 1969).

The Court also overlooks the impact its ruling will have on those individuals who are also citizens of the city of Richland, Mississippi. Miss. Code Ann. §41-67-15 (Supp. 2001), provides that:

Nothing in this chapter shall limit the authority of a municipality or board of supervisors to adopt

similar ordinances, which may be, in whole or in part, more restrictive than this chapter, and in those cases the more restrictive ordinances will govern.

With regard to individual on-site wastewater disposal systems, those citizens of Richland will be subject to regulation by at least three entities (*i.e.* the Board of Health, the municipality and the District). The import is that citizens of Richland may be subjected to paying fees to all three entities; may be required to grant an easement to each of these entities; may have to install wastewater disposal systems which comply with the regulations of each of these entities; may be subject to supervision from each of these entities; and may be required to deed over portions of their property to these entities.

This Court was eminently correct in finding that there remain genuine material issues of fact with regard to the question of whether the Policy and Procedures provision which Cleary sent to district residents is still in effect and whether enforcement of the Cleary ordinance constitutes a taking without just compensation. However, the Movant urges the Court to grant the Motion for Rehearing and adopt a ruling in line with that of the dissenting opinion of Justice Griffis, *supra*, in regard to the issue of whether Cleary had the statutory authority to enact the ordinance.

Respectfully submitted,

/S DAVID RINGER
DAVID RINGER,
ATTORNEY FOR
APPELLANT HAROLD GREEN

CERTIFICATE OF SERVICE

I, David Ringer, attorney for appellant, Harold Green, certify that I have this day served a copy of this Motion for Rehearing by United States mail with postage prepaid on the following person at these addresses.

JAMES A. BOBO, ESQ.
ATTORNEY FOR CLEARY WATER,
SEWER & FIRE DISTRICT
P. O. BOX 54193
PEARL, MS 39208

PAUL B. HENDERSON, ESQ.
ATTORNEY FOR THE CITY OF RICHLAND
P. O. BOX 23059
JACKSON, MS 39225-3059

This the 6th day of July, 2005.

Respectfully submitted,

/S DAVID RINGER
DAVID RINGER,
ATTORNEY FOR APPELLANTS

RINGER & SIMMONS,
ATTORNEYS AT LAW
DAVID RINGER, MSB #5364
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FLORENCE, MS 39073
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IN THE COURT OF APPEALS OF
THE STATE OF MISSISSIPPI

HAROLD GREEN, ET AL., AND
CITY OF RICHLAND, MISSISSIPPI APPELLANTS
v. CAUSE NO. 2003-CA-01062-COA
CLEARY WATER, SEWER &
FIRE DISTRICT APPELLEE

MOTION FOR REHEARING

8/17/04

COME NOW, HAROLD GREEN, and 123 others, by and through their attorney, and file this his Motion for Rehearing, and in support thereof would show unto the Court the following, to-wit:

I.

FACTUAL AND PROCEDURAL BACKGROUND

Cleary Water, Sewer and Fire District on June 21, 2001, enacted the Decentralized Wastewater Use Ordinance (the "Ordinance"). The Ordinance provides that homeowners who were not on the centralized water system as of June 21, 2001, are required to have their onsite wastewater system inspected and to annually provide proof that the system is working properly. Those who can not [sic] provide such proof would be required to install an approved system designated by the District. All costs associated with the inspection(s) and the replacement of a wastewater system is to be borne by the homeowner. Any replaced system would then be maintained by the District with the customer paying a monthly charge for said maintenance. The District issued letters to its

constituents on September 14, 2001, March 20, 2002 and June 5, 2002, declaring that failure to comply with the Ordinance would result in water service being disconnected.

Harold Green, *et al*, commenced this action on August 23, 2002, by filing a complaint against Cleary Water, Sewer and Fire District. The Complaint sought to enjoin Cleary Water, Sewer and Fire District from enforcing the requirements of the Ordinance. The complaint sought declaratory action to rule that the Ordinance was unconstitutional, was pre-empted by other state police power, was outside the ambit powers of the district, and was taking of property without just compensation. The trial court on April 17, 2003, granted the District's Motion for Summary Judgment and enter an Order finding that the Ordinance was "proper and is fully enforceable." Mr. Green perfected a timely appeal.

This Court on August 3, 2004, handed down its opinion affirming the Order of the trial court.

II.

DISCUSSION OF AUTHORITIES

A.

Whether the Ordinance Adopted by the Cleary Water, Sewer & Fire District Is a Valid Exercise of Any Police Power it May Be Granted Where Said Ordinance Falls Outside the Ambit of the Cleary Water, Sewer & Fire District's Statutorily Defined Field.

This Court relied on Miss. Code Ann. § 19-5-173 (Rev. 2003), in holding that the Cleary Water, Sewer & Fire District's (the "District") adoption of the ordinance was a

valid exercise of its general police power. However, where power to regulate has been delegated by statute to another agency or governmental unit, the District would have no authority to act. Inherent therein also is that any "general police power" granted the District would not give the District power to enact ordinances outside of the field in which it is specifically given statutory grant in which to regulate. This rule is set out in the case of *Clancy's Lawn Care & Landscaping, Inc. v. Mississippi State Board of Contractors*, 707 So. 2d 1080, 1083 (Miss. 1998), in which it was held as follows:

We have consistently held that "administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any such power exercised must be found within the four corners of the statute under which the agency operates." If the administrative agency exercises power that is not expressly granted by the legislature or can not be necessarily implied from the statutes granting power to the agency, then the agency's decision is void. This Court has interpreted "necessarily implied" as referring "to a logical necessity and means that no other interpretation is permitted by the words of the instrument construed, and it has been defined as an implication which yields so strong a probability of intent that any intention to the contrary cannot be supposed leaving no room for doubt."

(Citations omitted). The *Clancy*, Court further noted that any power of a governmental agency to regulate must [be] carried out within the confines of that agencies delegated responsibilities. *Id.* at 1085.

Even though a governmental agency be conferred police powers, and such power is not without its limitations. In

further illustration of this point, would the District's "general police power," give it authority to adopt ordinances to be carried out by the Highway Safety Patrol, in spite of such power being delegated to the Commissioner of Public Safety [sic], Miss. Code Ann. § 45-1-3; or to adopt ordinances regarding the disposal of oil and gas waste products, a power delegated to the State Oil & Gas Board, Miss. Code Ann. § 53-1-17? Where viewed in this light it becomes clear that an entity operating outside of their grant of power could have a catastrophic effect.

This Court cited to *Hollywood Cemetery Ass'n v. Board of Mayor and Selectman of City of McComb City*, 760 So. 2d 715 (Miss. 2000), in support of the holding that the District acted within its police power. However, *Hollywood Cemetery Ass'n*, is distinguishable for the case at bar. In *Hollywood Cemetery Ass'n*, the City of McComb (the "City") granted Hollywood Cemetery Association authority to open graves in city owned cemeteries. The City subsequently rescinded the order allowing Hollywood Cemetery Association to open graves and designated the City as the only entity authorized to open and close graves. Hollywood Cemetery Association appealed the City's rescission of the order. Hollywood Cemetery Association claimed that the City's actions violated their Federal and State Constitutional right by impairing a vested property interest. *Id.* at 718. Hollywood Cemetery Association, however, had no proof that it had any vested property interest to protect, in that it did not have a contract with the City. It was not an independent government entity. It was without a correlating independent police power. The Court noted that the City's actions were a valid exercise of their police power, the power to make orders respecting city owned cemeteries

being expressly granted the City in Miss. Code Ann. § 21-17-1. *Id.*

Conversely, in the case at bar, there was no express statutory grant of power to the Cleary Water, Sewer & Fire District to regulate individual on-site wastewater disposal systems. Instead, the District has proposed to cross statutory boundaries and regulate in an area which has statutorily been delegated to the Department of Health. See Miss. Code Ann. §§ 41-67-1, *et seq.*

In order to determine the District's ambit in which to exercise any "general police power" we must read all of the relevant statutes in conjunction. The primary rule of statutory construction is to determine legislative intent from the statute as a whole. *Bailey v. Al-Mefty*, 807 So. 2d 1203, 1206 (Miss. 2001). Legislative intent "must be determined by the total language of the statute and not from a segment considered apart from the remainder." *Manufab, Inc. v. Mississippi State Tax Com'n*, 808 So. 2d 947, 949 (Miss. 2002) (quoting *Brady v. John Hancock Mut. Life Ins. Co.*, 342 So. 2d 295, 298 (Miss. 1977)). As such, the District's grant of police power by Miss. Code Ann. § 19-5-173, must be read in conjunction with Miss. Code Ann. § 19-5-175, which demarcates the outer limits of the District's grant of power. Miss. Code Ann. § 19-5-175, provides that the powers of such water, sewer and fire districts:

shall be limited to the conducting and operating of a water supply system, a sewer system, a garbage and waste collection and disposal system, a fire protection system, a combined water and fire protection system, a combined water and sewer system, a combined water and garbage and waste collection and disposal system, or a

combined water, sewer, garbage and waste collection and disposal and fire protection system;

Miss. Code Ann. § 19-5-175, further recognizes the boundaries of the Districts powers by stating that such districts "shall be vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created." (Emphasis added). Nowhere in the statutes' list of areas in which the District is authorized to act is there recited the power to regulate individual on-site wastewater disposal systems. Same is preempted by the legislatures delegation of such authority to regulate individual on-site wastewater disposal systems to the Health Department as further discussed, *infra*.

B.

Whether the Enactment of the Mississippi Individual On-Site Wastewater Disposal System Law Has Preempted the Field?

It was held, in *City of Jackson v. Mississippi State Building Comm'n*, 350 So. 2d 63, 66 (Miss. 1977), that "express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith." The Mississippi State Legislature had developed a comprehensive scheme for the State Board of Health to regulate the "design, construction, operation and maintenance of individual on-site wastewater disposal systems. Miss. Code Ann. § 41-67-3. This statutory scheme includes provisions for the approval of such systems, Miss. Code Ann. § 41-67-7; the testing and inspection of such systems, Miss. Code Ann. §§ 41-67-10, 41-67-23; and the assessment of fees and penalties, Miss. Code Ann. §§ 41-67-21, 41-67-28.

In direct contradiction to the provisions contained in the Mississippi Individual On-Site Wastewater Disposal System Law, the Cleary Water, Sewer & Fire District has adopted an ordinance in which the District grants to itself those powers which the Legislature has seen fit to delegate to the Department of Health. Miss. Code Ann. § 41-67-1, *et seq.* The Ordinance provides, *inter alia*, that the District shall have the power to "exercise supervision over the design, construction, operation and maintenance of individual on-site wastewater disposal systems . . .". See Decentralized Wastewater Use Ordinance, Art. III, Sec. 5. This, and other powers the Districts seeks to usurp, the Legislature expressly granted to the Department of Health. Miss. Code Ann. § 41-67-3. The District has even gone so far as to develop its own scheme for civil and criminal penalties for violations of its ordinance, in contravention of those set out by the Legislature for any such violation under the Mississippi Individual On-Site Wastewater Disposal System Law. See Miss. Code Ann. § 41-67-21 & 41-67-28. See also Decentralized Wastewater Use Ordinance, Art. XII.

It matters not that the Mississippi Individual On-Site Wastewater Disposal System Law does not expressly prevent such districts from regulating in the field. First, because the District can not act except as granted power to act by express Legislative provision. Which in the case at bar, the Legislature has made no express grant to the District to regulate individual on-site wastewater disposal systems. See *Clancy's Lawn Care & Landscaping, Inc. v. Mississippi State Board of Contractors*, 707 So. 2d 1080, 1083 (Miss. 1998). See also Miss. Code Ann. § 19-5-1, *et seq.* The Legislative delegation of power is not all inclusive, except as excluded. Secondly, the ordinance adopted

by the District is in direct conflict with the Mississippi Individual On-Site Wastewater Disposal System Law and therefore is void. *City of Jackson v. Mississippi State Building Comm'n*, 350 So. 2d 63, 66 (Miss. 1977).

This Court found that the ordinance adopted by the Cleary Water, Sewer & Fire District was adopted at the request and express approval of the Mississippi State Department of Health and at the express approval of the Mississippi Department of Environmental Quality. See *Green v. Cleary Water, Sewer & Fire District*, No. 2003-CA-01062-COA (§19) (Miss. App. 2004). The basis for this holding were affidavits produced on the day of trial, in contravention of the Rules of Civil Procedure, and having no indication that the affiants had any authority to speak for the agency. It has been made clear in Mississippi that governmental agencies can only speak and act through their official minutes. There was offered no evidence that the minutes of the Mississippi Department of Health or the Mississippi Department of Environmental Quality requested and/or approved the District's ordinance.

A similar situation was addressed in *Ann May Enterprises, Inc. V. Caples*, 724 So. 2d 1127 (Miss. App. 1998). The issue presented was whether the Calhoun County Board of Supervisors had abandoned a public road. The Board's minutes did not reflect any indication that the supervisors intended to abandon the road. During litigation, however, the county pled in its answer that it had abandoned the road. In evaluating the validity of such statement of the county the Court held as follows:

That conclusory statement, however, cannot be binding on the parties. The county, as a public governmental body, can only speak and act through its official minutes. It is undisputed that

there is no formal act of closure reflected in the supervisors' minutes. Whether a road has lost its public character through long periods of neglect by the responsible governmental authority and by lack of use by members of the public is a question of fact that can only be answered in an appropriate judicial proceeding, and is not one on which the supervisors can speak definitively in the course of litigation.

Id. at 1131.

In the case at bar, any affidavit presented on behalf of the governmental agencies cannot be afforded any weight, as same are not the official pronouncement of the entities. The entities can only speak and act through its official minutes. Absent a showing that the minutes reflect the entities request and/or approval of the District's adoption of the ordinance the affidavits are not a proper consideration upon which to base such a finding.

Additionally, nothing within Miss. Code Ann. § 41-67-1, *et seq.*, gives the Department of Health the authority to delegate its duties and responsibilities to the District. If the Legislature had intended that the Department of Health delegate the duties and responsibilities granted unto it, the Legislature would have expressly stated. See e.g. Miss. Code Ann. § 41-67-77 ("State Medical Examiner may delegate specific duties . . ."). The Department of Health is likewise bound to act only within the specific grant of power. Therefore, absent the express grant of power to delegate the State Health Department is without such authority.

Respectfully submitted,

/s/ David Ringer
DAVID RINGER,
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, David Ringer, attorney for appellant, Harold Green, certify that I have this day served a copy of this Motion for Rehearing by United States mail with postage prepaid on the following person at these addresses.

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This the 17th day of August, 2004.

Respectfully submitted,

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STATE	WASTE- WATER DISPOSAL SYSTEMS AFFECTED	PERCENTAGE OF HOUSE- HOLDS AFFECTED	SOURCE OF INFORMATION
Alabama	759,597	45.5%	U.S. Census Bureau, 1990; ^{*1}
Alaska	87,703	37.7%	U.S. Census Bureau, 1990
Arizona	310,594	18.7%	U.S. Census Bureau, 1990; ^{*2}
Arkansas	399,479	39.9%	U.S. Census Bureau, 1990; ^{*3}
California	1,160,039	10.4%	U.S. Census Bureau, 1990
Colorado	194,163	13.1%	U.S. Census Bureau, 1990
Connecticut	385,309	29.2%	U.S. Census Bureau, 1990
Delaware	77,126	26.6%	U.S. Census Bureau, 1990
District of Columbia	2,008	0.7%	U.S. Census Bureau, 1990
Florida	7,600 469	26.2%	U.S. Census Bureau, 1990

^{*1} RULES OF STATE BOARD OF HEALTH BUREAU OF ENVIRONMENTAL SERVICES DIVISION OF COMMUNITY ENVIRONMENTAL PROTECTION Administrative Code 420-3-1; <http://www.adph.org/Default.asp?bhcp=1>

^{*2} <http://www.azdeq.gov/environ/water/wastewater/septic.html>

^{*3} http://www.adeq.state.ar.us/water/branch_permits/default.htm

STATE	WASTE- WATER DISPOSAL SYSTEMS AFFECTED	PERCENTAGE OF HOUSE- HOLDS AFFECTED	SOURCE OF INFORMATION
Georgia	999,439	37.9%	U.S. Census Bureau, 1990
Hawaii	76,998	19.8%	U.S. Census Bureau, 1990
Idaho	148,709	36.0%	U.S. Census Bureau, 1990
Illinois	620,586	13.8%	U.S. Census Bureau, 1990
Indiana	720,236	32.1%	U.S. Census Bureau, 1990
Iowa	274,613	24.0%	U.S. Census Bureau, 1990
Kansas	196,345	18.8%	U.S. Census Bureau, 1990
Kentucky	657,354	43.6%	U.S. Census Bureau, 1990
Louisiana	469,563	27.4%	U.S. Census Bureau, 1990
Maine	320,701	54.6%	U.S. Census Bureau, 1990
Maryland	358,118	18.9%	U.S. Census Bureau, 1990
Massachusetts	669,535	27.1%	U.S. Census Bureau, 1990

STATE	WASTE- WATER DISPOSAL SYSTEMS AFFECTED	PERCENTAGE OF HOUSE- HOLDS AFFECTED	SOURCE OF INFORMATION
Michigan	1,123,518	29.2% See* ⁴	U.S. Census Bureau, 1990;* ⁵
Minnesota	491,925	26.6%	U.S. Census Bureau, 1990
Mississippi	425,238	42.1%	U.S. Census Bureau, 1990
Missouri	581,133	26.4%	U.S. Census Bureau, 1990
Montana	142,783	39.5%	U.S. Census Bureau, 1990
Nebraska	125,929	19.1%	U.S. Census Bureau, 1990
Nevada	62,751	12.1%	U.S. Census Bureau, 1990
New Hampshire	253,844	50.4%	U.S. Census Bureau, 1990
New Jersey	371,821	12.1%	U.S. Census Bureau, 1990
New Mexico	179,124	28.3%	U.S. Census Bureau, 1990

*⁴ However 50% of building permits issued for new single family homes are for those with on-site systems.

*⁵ THE STATUS OF THE ON-SITE WASTEWATER INDUSTRY IN MICHIGAN YEAR 2001, [http://www.deq.state.mi.us/documents/deq-dwrpd-eh-Onsite_Wastewater_Industry_in_Michigan_\(Final\).pdf](http://www.deq.state.mi.us/documents/deq-dwrpd-eh-Onsite_Wastewater_Industry_in_Michigan_(Final).pdf)

STATE	WASTE- WATER DISPOSAL SYSTEMS AFFECTED	PERCENTAGE OF HOUSE- HOLDS AFFECTED	SOURCE OF INFORMATION
New York	1,509,974	20.9%	U.S. Census Bureau, 1990
North Carolina	1,415,160	50.2%	U.S. Census Bureau, 1990
North Dakota	72,012	26.1%	U.S. Census Bureau, 1990
Ohio	979,160	22.4%	U.S. Census Bureau, 1990
Oklahoma	377,905	26.9%	U.S. Census Bureau, 1990
Oregon	358,022	30.0%	U.S. Census Bureau, 1990
Pennsylvania	1,267,802	25.7%	U.S. Census Bureau, 1990
Rhode Island	120,671	29.1%	U.S. Census Bureau, 1990
South Carolina	598,401	42.0%	U.S. Census Bureau, 1990
South Dakota	84,440	28.9%	U.S. Census Bureau, 1990
Tennessee	812,133	40.1%	U.S. Census Bureau, 1990
Texas	1,318,449	18.8%	U.S. Census Bureau, 1990
Utah	69,524	11.6%	U.S. Census Bureau, 1990

STATE	WASTE- WATER DISPOSAL SYSTEMS AFFECTED	PERCENTAGE OF HOUSE- HOLDS AFFECTED	SOURCE OF INFORMATION
Vermont	156,013	57.5%	U.S. Census Bureau, 1990
Virginia	755,547	30.3%	U.S. Census Bureau, 1990
Washington	644,982	31.7%	U.S. Census Bureau, 1990
West Virginia	353,365	45.2%	U.S. Census Bureau, 1990
Wisconsin	615,750	30.0%	U.S. Census Bureau, 1990
Wyoming	52,407	25.8%	U.S. Census Bureau, 1990
U.S. Totals	25,808,467	25.2%	